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WISCONSIN REPORTS

121

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MARCH 22 — MAY 10, 1904.

FREDERIC K. CONOVER
OFFICIAL REPORTER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
JOSHUA ERIC DODGE,
ROBERT G. SIEBECKER.

Attorney General, - L. M. STURDEVANT,

Clerk, - - - CLARENCE KELLOGG.

ERRORS NOTED IN PREVIOUS VOLUMES.

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Page 610, lines — 2, 3. For superior court of, read circuit court for; and for J. C. LUDWIG, read LAWRENCE W. HALSEY.

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Page 320, line 2. For D. H. JOHNSON, read LAWRENCE W. HALSEY.
" 354, line — 14. For LAWRENCE W. HALSEY, read ORREN T. WILLIAMS.

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" 274, line — 14. For R. G. SIEBECKER, read E. RAY STEVENS.

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CASES DETERMINED

AT THE

January Term, 1904.

TILLY and others, Appellants, vs. MITCHELL & LEWIS COMPANY, Respondent.

February 24—March 22, 1904.

Municipal corporations: Vacating streets: Validity of ordinance, who may question: Persons peculiarly injured: Motives of council not inquired into: Bridges over streets: Power of council.

1. Where the proposed vacation of a part of a street and occupation thereof by private individuals pursuant to city ordinances will greatly depreciate the value of lots fronting on other parts of said street, the threatened injury to the owners of such lots is a special or peculiar one, differing in kind from that to be suffered by the general public and entitling them to sue on their own behalf to have such ordinances declared void.
2. An ordinance within the power of the city council cannot be held void on the ground that the council or its members acted from improper motives, at least in the absence of corruption or fraud.
3. Thus, an ordinance vacating portions of a street for the reasons, stated therein, that such portions are of no public utility and that the public interest requires such vacation, cannot be successfully attacked on the ground that its sole purpose was that the vacated portions might be devoted to private uses contrary to the public interest.
4. The ground upon which ordinances wholly unreasonable are held void is that they are beyond the power of the council.
5. A city council has no power to grant to private individuals a right to construct a building or bridge over a public street to connect the buildings on the sides thereof, although passageway for public travel be left beneath.

APPEAL from a judgment of the circuit court for Racine county: B. F. DUNWIDDIE, Judge. *Reversed.*

This is an action in equity brought to declare void two ordinances of the city of Racine, one of which attempts to vacate a portion of Eighth street in said city, and the other to permit the defendant corporation to make certain uses of a part of said Eighth street.

It appears by the complaint that Eighth street in the city of Racine is a street sixty feet in width and about three-quarters of a mile in length, running due east and west from Lake Michigan to Root river, and that it is much used by passengers on foot and in vehicles; that it is crossed by a number of streets running north and south, among which are Center street and Washington avenue, the latter being one block west of the former; that between the two last-named streets there existed originally a considerable depression in Eighth street, which has been filled in at great public expense, and that at this point Eighth street crosses the Chicago, Milwaukee & St. Paul Railway tracks upon a viaduct; that all the other east and west streets south of Eighth street for nearly a mile cross said railway tracks at grade, on which account the public are accustomed to use said Eighth street between Center street and Washington avenue to a great extent in order to avoid the danger of crossing said tracks at grade; that the defendant corporation owns the land on both sides of that part of Eighth street between Center street and Washington avenue, and operates a large manufactory north of and adjoining said portion of Eighth street; that the plaintiff *Fischer* owns and occupies as a homestead a lot on the northeast corner of Eighth and Center streets; that the plaintiff *Tilly* owns and occupies a lot on the southwest corner of Eighth and Racine streets, two blocks west of the vacated portion of Eighth street; that the plaintiff *Nelson* owns and uses for a residence and a drug store a lot and building at the corner of Eleventh street and Washington

avenue, being three blocks south of the vacated portion of Eighth street, and the plaintiffs *Owen* own and occupy certain lots on Racine street about two blocks west of the vacated portion of Eighth street; that the defendant corporation petitioned the council of the city of Racine for the vacation of that part of Eighth street between Center street and Washington avenue, and that in accordance with said petition, on the 5th day of January, 1903, the said common council passed an ordinance vacating the north twenty-five feet and the south fifteen feet of that part of Eighth street lying between Center street and Washington avenue, leaving a strip twenty feet in width unvacated, and that the sole object of the passage of said ordinance was to devote the vacated portion of said street to the private uses of the defendant, although the same were of great public utility and the public interest did not require such vacation; that by reason of the peculiar location of the property of the plaintiffs each of them will suffer peculiar injuries, in that the said real estate of each of said plaintiffs will be greatly depreciated in value by reason of such vacation and the means of access and egress will be interfered with; that the plaintiff *Nelson* will suffer great loss in the operation of his drug store by reason of the decrease of travel caused by such vacation, and that the plaintiffs have no adequate remedy at law; that the said common council by their action have devoted a public thoroughfare to purely private uses, and that their said action is irregular, illegal, and *ultra vires;* that the said ordinance was passed solely at the request of the defendant corporation and for its private benefit, and that the public interest did not require a vacation of said street, all of which the mayor and common council well knew; that the defendant corporation threatens to occupy the portion of said street so vacated with large factory buildings for their own private uses.

For a second cause of action the plaintiffs restate the gen-

eral allegations as to the character of Eighth street, the ownership of lands, etc., as hereinbefore recited, and further allege that in December, 1902, the defendant corporation petitioned the common council in the city of Racine to allow it to build over and across the twenty-foot strip of land in Eighth street aforesaid, which was not vacated, such buildings, bridges, and passageways as their business might require, the same to be not less than fourteen feet above the surface of the street, agreeing that in case such permission was granted the said corporation would pave and keep in good repair the said twenty-foot strip, as directed by the council; that in accordance with such petition the council passed the second ordinance granting said privileges to the defendant corporation, and that said ordinance is null and void because it attempts to grant a portion of the public street and easement to private uses; that the defendant corporation is about to use and occupy the privileges so attempted to be granted, and to construct buildings over said portion of Eighth street in accordance with the terms of said ordinance; that both of said ordinances were the result of a bargain and contract between the mayor and the council of said city and the defendant corporation in reference to the occupation by the defendant of said Eighth street for its own private use. Here follow allegations of special injury resulting to the plaintiffs' property from the passage of the second ordinance similar to those before recited as resulting from the first ordinance.

Judgment is demanded that both ordinances be declared void and that the defendant corporation be restrained from entering on said street or building buildings thereon.

The defendant demurred to this complaint, on the ground that the plaintiffs had not legal capacity to sue, and the further ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained,

and, the plaintiffs not choosing to amend, judgment was rendered for the defendant, and the plaintiffs appeal.

For the appellants there was a brief by *Hand & Hand,* and oral argument by *E. B. Hand.*

For the respondent there was a brief by *Kearney, Thompson & Myers,* and oral argument by *T. M. Kearney* and *W. D. Thompson.*

WINSLOW, J. This is an action in equity by property owners suing in their own right to declare void two ordinances passed by the common council on the ground that they unlawfully devote a public street to private use.

The first question raised by the demurrer is whether the plaintiffs, or any of them, show themselves entitled to maintain an action on their own behalf. This court at an early day recognized the rule that in order to entitle a private person to maintain an action for damages resulting from the obstruction of a public way, or an action in equity to prevent such an obstruction, it must appear that the plaintiff has sustained damage differing not merely in degree, but in kind, from the damage sustained by the general public. In other words, the plaintiff's injury must be of a different character from that sustained by the public in general. *Walker v. Shepardson,* 2 Wis. 384. This rule has been consistently followed, and is in accord with the law elsewhere. *Clark v. C. & N. W. R. Co.* 70 Wis. 593, 36 N. W. 326; *Zettel v. West Bend,* 79 Wis. 316, 48 N. W. 379; *Baier v. Schermerhorn,* 96 Wis. 372, 71 N. W. 600. This rule, like many others, is far easier of statement than of application. Indeed, it seems hardly possible to lay down any rule which shall be so clearly stated and so universally applicable that the mere statement of it will solve the question of what constitutes this peculiar and different injury in a given case. It is very well settled that the mere fact that a property

owner is compelled to pursue a longer route in going to or coming from his real estate constitutes no peculiar or different injury. This is an injury which is shared by the general public, though not in the same degree. *Zettel v. West Bend, supra; Clark v. C. & N. W. R. Co., supra.* On the other hand, in *Walker v. Shepardson, supra,* the driving of piles in front of plaintiff's wharf, thus impairing the *value* and usefulness thereof, was held a special and peculiar injury. So, also, in *Barnes v. Racine,* 4 Wis. 454, the building of an unlawful bridge in a navigable river, which would impede navigation and interfere with the use of wharfs and docks owned by riparian proprietors, and *impair their value,* was held to be such an injury. So the unlawful closing of a street or public place, forming the *only* access to plaintiff's premises, is always held to be such an injury. *Williams v. Smith,* 22 Wis. 594. And it is not necessary that the street or place form the *only* access to the plaintiff's premises. If the plaintiff's lots adjoin the street or place to be closed, even though there be other access, and it is shown that the value of the lots will be greatly diminished and the risk from fire increased, and the lots otherwise injured, the required special and peculiar injury is shown. *Pettibone v. Hamilton,* 40 Wis. 402. Again, it has been frequently held that one who buys a lot in a plat whereon streets are marked has the right, as against his grantors, to have the streets on the plat which are appurtenant to his lot and contribute to its value forever kept open, and may enforce that right by private action. *Donohoo v. Murray,* 62 Wis. 100, 22 N. W. 167; *McFarland v. Lindekugel,* 107 Wis. 474, 83 N. W. 757. A learned review of the authorities then existing on this question is found in the case of *Stetson v. Faxon,* 19 Pick. 147, and is referred to with approval in *Enos v. Hamilton,* 27 Wis. 256. That was a case where a highway by prescription had been built upon by the defendant, and his building diverted travel from and obscured the plaintiff's

warehouse, making it less eligible as a place of business, and productive of less rent, but not cutting off access from other streets, and it was held that the plaintiff had suffered a special damage entitling him to sue alone. In discussing the two kinds of injuries, public and private, resulting from the obstruction of a highway, the court in that case well says:

"The people at large are supposed to be injured merely because they cannot pursue a particular track, which is an inconvenience felt by thousands, to be redressed by a prosecution in the name of the commonwealth. They suffer no actual particular injury to their trade or estates, and a prosecution on behalf of the public furnishes the appropriate remedy. But individuals *who in their persons or estates suffer great damage,* which may be proved to proceed and follow necessarily from the public nuisance, surely stand upon different ground, and each may have his action and recover for the particular damage according to the evidence."

The phrase used in the foregoing quotation, *"individuals who in their persons or estates suffer great damage,"* comes perhaps as near being a satisfactory expression of the principle as any that has been used. As before indicated, a person whose lot abuts upon the particular piece of street which is unlawfully closed or obstructed is universally held to be specially and peculiarly injured, though he may have other access to his lot; but many of the cases draw an arbitrary line at this point, and maintain that when the plaintiff's lot fronts upon another part of the street no such injury is shown. Certainly the distinction is illogical. The man whose lot fronts upon the next block may be fully as deeply injured in the decreased value, rentability, and desirability of his lot as the man whose lot fronts on the block which is closed. One may suffer as great damage in his estate as the other. True, there may be many such individual owners, but that cannot affect individual rights. There may be twenty or there may be fifty of them, but if each has suffered great damage to his estate by the unlawful closing of

a street, why shall not each have his action? Neither twenty men nor fifty men constitute the general public. The general public is composed of the great mass of individuals who own no property in the vicinity and who may wish to pass over the street or not, and who, if they do, simply suffer the trifling inconvenience of being obliged to make a circuitous trip. The man who owns a lot in the next block, and whose lot has lost a great part of its value by reason of the closing of the street, manifestly suffers some injury different in its nature from the mere inconvenience suffered by the general public. There are at least two plaintiffs in the present case who own lots fronting on Eighth street—one in the next block to the east, and the other two blocks to the west of the block attempted to be vacated. The complaint alleges distinctly that the property of each will be greatly depreciated in value by the proposed vacation and occupation of the street. We hold this to be a sufficient allegation of special or peculiar injury to entitle them to maintain an action of this kind, and we do not find it necessary to go further or critically examine the rights of the remaining plaintiffs. This conclusion is believed to be in strict harmony with and analogous to the principle adopted in the line of cases holding that where by an unlawful, though temporary, obstruction in a navigable river a manufacturer is deprived of access to his mill and his business damaged thereby, or an improvement company loses tolls, or a logger is put to additional expense in handling his logs, there is in each case a peculiar injury different from that suffered by the general public who might wish to navigate the river, which will sustain a private action. *Enos v. Hamilton,* 27 Wis. 256; *Wis. River Imp. Co. v. Lyons,* 30 Wis. 61; *Gates v. N. P. R. Co.* 64 Wis. 64, 24 N. W. 494. In each case the special and peculiar injury is simply a direct and substantial loss in money, a damage to the person or estate of an individual traceable directly to the public nuisance, and not common

to the public in general, and so answering the requirements of the text laid down in *Stetson v. Faxon,* 19 Pick. 147.

Proceeding from this question to the merits of the controversy, we are to consider first the attack upon the ordinance which attempts to vacate all but a twenty-foot strip of Eighth street between Center street and Washington avenue. The charter of the city of Racine (sec. 54, ch. 40, Laws of 1891) gives the common council of the city power to vacate, in whole or in part, such streets or alleys in the city "as in their opinion the public interest may require to be vacated, or such as in their opinion are of no public utility." The section provides for notice of hearing prior to the adoption of the ordinance, and also for the assessment of benefits and damages on request of any party interested.

The ordinance of vacation in the present case declares that the north twenty-five feet in width and the south fifteen feet in width of that part of Eighth street between Center street and Washington avenue is vacated "for the reason that such portions of said street are of no public utility and for the reason that the public interest requires such vacation." Although it is alleged in the complaint that the ordinance is void, and that the proceedings resulting in its passage were illegal, irregular, and *ultra vires,* there is no specific charge of any irregularity or illegality in its passage, nor was it claimed upon the argument that there was any such irregularity or illegality in procedure. The claim is and was that the ordinance of vacation was passed solely for the private benefit of the defendant corporation, and that the public good in no way demanded it, and hence that it was illegal and void. So the question really is whether in this action the validity of the ordinance can be challenged on the ground that the council acted from a wrong motive. Corruption is not claimed, fraud is not claimed, want of power is not claimed, but the simple claim is that the members of the council in exercising their legislative powers acted from im-

proper motives and subordinated the public interest to the private interests of the defendant corporation.

The general principle that legislative acts within the power of the legislative body to pass are not subject to revision or control by the courts on the ground of inexpediency, injustice, or impropriety is well settled, and has nowhere been stated with greater vigor than by this court. Thus, in *Brodhead v. Milwaukee,* 19 Wis. 624, it was said:

"This court can, and when properly presented must, deal with and determine questions of the power of the legislature under the constitution; but it cannot lay its hand upon or interdict a statute, or arrest its operation, because such statute is either unwise, unjust, or oppressive, there being no question of legislative power involved."

The supreme court of the United States in *Angle v. C., St. P., M. & O. R. Co.* 151 U. S. 1, 14 Sup. Ct. 240, thus enunciates the doctrine:

"The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is *limited to the question of power,* and does not extend to the matter of expediency, the motive of the legislators, or the reasons which are spread before them to induce the passage of the act. This rule rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly."

In both of the cases quoted from, acts of the legislature were under consideration, but the same general principle has been frequently recognized as applicable to the acts of the common council which are legislative in their character, as is the ordinance under consideration. *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 81 N. W. 1046; *Lange v. La Crosse & E. R. Co.* 118 Wis. 558, 95 N. W. 952. It is true that certain apparent exceptions to the rule are recognized, as, for instance, where an ordinance is entirely unreasonable.

This, however, can hardly be properly called an exception, because it is in fact a case simply of lack of power. Power is not delegated to municipal bodies to pass ordinances which are wholly unreasonable. An example of this principle is found in *Le Feber v. West Allis,* 119 Wis. 608, 97 N. W. 203, where an ordinance granting lighting franchises, which was also a contract, was held void for unreasonableness, and it was said that legislative power was delegated to subordinate political divisions of the state for public purposes only, and that if an act be so remote from every public purpose that no relation thereto can within human reason be discovered, such an act must be deemed to be beyond the power of a subordinate legislative body, and will be set aside by the courts. See, also, *Clason v. Milwaukee,* 30 Wis. 316; *Stafford v. C. V. E. R. Co.* 110 Wis. 331, 85 N. W. 1036, and cases cited.

It is said in McQuillan on Municipal Ordinances (sec. 161): "Neither the motives of the members nor the influences under which they acted can be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate powers." Mr. Dillon, in his work on Municipal Corporations, at sec. 311 (4th ed.), says: "It is doubtless true that the courts will not in general inquire into the motives of the council in passing ordinances." He follows this statement with the remark: "We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached *for fraud,* at the instance of persons injured thereby." This seems to be simply the author's own view.

In *Soon Hing v. Crowley,* 113 U. S. 703, 5 Sup. Ct. 730, it was said by Mr. Justice FIELD in the opinion of the court relating to a city ordinance claimed to be unreasonable:

"The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they

may be disclosed on the face of the acts or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. . . . The diverse characters of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, preclude all such inquiries as impracticable and futile."

In the case of *Knapp-Stout & Co. Co. v. St. Louis,* 156 Mo. 343, 56 S. W. 1102, an ordinance vacating part of a street was attacked by a property owner on the street on the same grounds as in the present case, and the court said that in the absence of fraud the passage of such an ordinance comes within the legislative powers expressly delegated to the city by its charter to vacate streets and alleys, and that power will not be controlled or reviewed by the courts. In the case before us neither fraud nor corruption is alleged, so that it is unnecessary for us to consider the suggestion of Mr. Dillon and the Missouri supreme court. The sole claim is that the council have vacated a part of a street for a private use when it was needed by the public. This means that the motives of the councilmen were wrong and their judgment unsound. We think the courts will not entertain an inquiry into the truth of these charges. The ordinance was within their power to pass. On its face it purports to be passed for a purely public purpose. Such a purpose is entirely possible, notwithstanding a private benefit may at the same time inure to the defendant. The exemption from keeping in repair a wide street and the lessened expense of caring for a narrow one may have been considered an entirely adequate public gain to justify the vacation, and who shall say that the aldermen did not have this idea in mind?

Doubtless had the council attempted to sell and convey a part of the street to the defendant, its action could be held void by the courts, because that would be an act beyond its

power; but it was within the power of the council to vacate the street, when in its judgment the public interest required such action, and even though the council may have been wrong in its judgment, or may have mistaken a private interest for a public one, our conclusion is that the courts cannot arrest the operation of the ordinance for these reasons, and hence that no cause of action is stated in the first count of the complaint.

The second count, however, presents an entirely different question. By the ordinance here attacked the council attempted to grant to the defendant the right to bridge over the remaining twenty feet of the street not vacated, and build buildings to any height thereon, for private uses, provided it left a passageway twenty feet wide and fourteen feet in height, and kept the same lighted, paved, and in repair, as required by the council. It is impossible for us to perceive how it can be claimed that the council had power to grant any such rights to any one in a public street. So long as it remains a street, it is reserved for public uses and for public uses alone, and the council has no power to devote any part of it to private uses, even though that part be merely a part of the space above the roadbed. Elliott, Roads & Streets (2d ed.) § 647. In *Reimer's Appeal,* 100 Pa. St. 182, it was well said, in reference to this identical question of the power of a common council to authorize the building or projections over the street and sixteen feet above the sidewalk:

"The right of passing along or over a road has connected with it certain incidents which are essential to the enjoyment of it, such as light, air, and view. If a highway should be covered over, for instance, by the owners of property fronting on either side of it, so as to shut out the light from above, the enjoyment would not only be greatly interfered with, but it might often be rendered dangerous and practically useless."

The same doctrine is held with reference to a private bridge over an alley in the case of *Field v. Barling,* 149 Ill.

556, 37 N. E. 850, where a number of authorities along the same line are cited and reviewed. Common councils have no authority to turn a street into a tunnel for the purpose of granting to private parties for private use the enjoyment of everything above the tunnel. The proposition needs no authority. The council holds the easement in the street for public use alone. The attempt to divert a part to private use is an attempt to exceed their powers, and hence, under principles already stated, can be controlled by the courts. It follows that the second count in the complaint states a good cause of action.

By the Court.—Judgment reversed, and action remanded with directions to enter an order sustaining the demurrer as to the first cause of action, and overruling the same as to the second cause of action, and for further proceedings according to law.

STANDARD MANUFACTURING COMPANY, Appellant, vs. SLOT, Respondent.

February 24—March 22, 1904.

Contracts: Signature induced by false representations: Fraudulent intent: Evidence: Inexcusable negligence: Appeal: New trial.

1. If false statements of fact, made by one party in negotiations leading to the execution of a contract, were of such a character as reasonably to excuse the other party from reading the contract and he was thereby induced to execute it, which he would not have done had he known its contents, such contract is not binding upon him unless he subsequently ratifies it with knowledge of the facts or in some other way precludes himself from rescinding it.
2. In an action upon a contract of sale which defendant claimed he had been induced to sign, without reading it, by the false representations of plaintiff's agent that it was a commission agreement, it is immaterial whether such representations were

made with fraudulent intent or not, and the admission of evidence of similar transactions between the agent and other persons, in no way involved in the litigation, offered for the purpose of showing such intent, was prejudicial error.

3. In such action plaintiff should have been allowed to ask defendant, on cross-examination, whether he had ever thought of the subject of consignment or of the word "commission" before the action was brought.
4. To entitle a party to relief from a contract on the ground of fraud, he must establish the fraud by a preponderance of the evidence, which also must be clear and satisfactory.
5. One who, when he signed a contract was inexcusably ignorant of its contents, is not entitled to relief from its obligations on the ground that the other party induced him to sign by false representations as to such contents.
6. Defendant, a business man of ordinary intelligence and considerable experience, signed, without reading it, a contract for the purchase of goods, both the vendor and the agent with whom the negotiations were had being strangers to him. In an action upon the contract he claimed that he had signed in reliance upon the agent's fraudulent representations that it was a mere commission contract. He admitted that the agent had requested him to read the paper before signing it, but testified that he did not do so because he was busy and because he did not usually read such papers before signing. After signing he laid the paper away. A mere glance at the few lines in close connection with the signature would have shown him that he was not making a commission contract and that he was signing a stipulation that he had read the contract and knew its contents and was satisfied therewith. *Held*, that even if false representations were made as to the contents of the instrument—a fact not clearly established—defendant's negligence was so inexcusable that he was not entitled to relief from the contract.
7. A mere motion in the trial court for judgment notwithstanding the verdict, without a motion to change the findings of the verdict to conform to the evidence, does not make it proper for the supreme court, on reversing the judgment entered upon the verdict, to dispose of the case finally without a new trial.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

Action to recover on a written contract. The terms thereof are to the following effect: Plaintiff offered to furnish de-

fendant a specific quantity of flavoring extracts, toilet and miscellaneous articles for $173 upon certain conditions, and defendant accepted such offer. Such terms and conditions were, in the main, that defendant might return any articles not found suitable to his trade, the purchase price thereof to be credited to him in payment for new goods to the extent of two thirds the price of the latter; that he might return any goods mentioned in the contract or thereafter ordered, returned to him by any consumer as unsatisfactory, if not more than half the contents had been used; that he might return any goods unsatisfactory in style, quality, price, salability, or for any cause, in payment for new goods as before stated; and that he should not countermand the order. Plaintiff agreed to furnish show cases and other facilities specified to aid in displaying and selling the goods, guarantied a profit of $86.50 on the goods handled for one year, and agreed, if the sales were not sufficient to pay the same, to take back all goods at the purchase price, remaining on hand at the end of such year, or make up such profit in cash. It was stipulated that all goods shipped and not on hand or returned, except free goods, should be considered as sold, and the profits figured at the difference between the net wholesale and retail prices named in the contract. It was further stipulated that plaintiff's salesman possessed no authority to make any contract except by use of and according to plaintiff's regular form; that no goods should be considered as shipped on consignment or commission; that no representation made by the salesman should be deemed binding upon the plaintiff unless mentioned in the contract and received and accepted by plaintiff; that defendant should make certain specified efforts in selling plaintiff's goods, and pay the purchase price of $173 in four equal payments due in two, four, six, and eight months from the date of the invoice, provided the defendant sent, upon arrival of the goods, acceptances due as aforesaid; otherwise the $173, less five per cent., was payable upon such

arrival. The contract further contained stipulations that defendant had read the same, knew the contents thereof, and that plaintiff would send to defendant a bond guarantying the profit of $86.50.

The complaint contained all necessary allegations to entitle plaintiff to recover $173 upon the aforesaid contract. Defendant answered that his signature thereto was obtained by fraud; that plaintiff's agent represented to him at the time the same was signed that it was a commission contract, and that he affixed his signature thereto relying thereon; that as soon as he discovered the true character of the paper he repudiated it and refused to accept the goods contracted for thereby.

At the close of the evidence plaintiff's counsel moved for a directed verdict, which was overruled. The jury found as follows, in substance: (1) Plaintiff falsely represented to defendant that the agreement signed was for the acceptance and sale of goods upon commission, and that he would be entitled to return any thereof at any time he desired, and no charge would be made for goods so returned. (2) Defendant was induced to sign the contract by such false representations. (3) Plaintiff is entitled to judgment for $178.22 if for anything.

Thereafter plaintiff's counsel moved the court for judgment notwithstanding the verdict, and that being denied moved for a vacation of the first and second findings upon numerous grounds and for a new trial, which was also denied. Judgment was then rendered upon motion of defendant's counsel, dismissing the complaint with costs. The evidence, rulings, and exceptions, so far as necessary to be mentioned upon the appeal, will be stated in the opinion.

For the appellant there was a brief by *Kearney, Thompson & Myers,* and oral argument by *T. M. Kearney* and *W. D. Thompson.*

For the respondent there was a brief by *Cooper, Simmons, Nelson & Walker,* and oral argument by *J. B. Simmons.*

MARSHALL, J. The court, against appellant's objections, permitted evidence to be introduced respecting several transactions claimed to have taken place between its agent and strangers to the litigation, of the kind respondent was charged with. They were entirely independent of the occurrence under investigation. The evidence seems to have been offered to prove guilty intent on the part of appellant in making the alleged false representations which respondent claimed induced him to sign the contract. It was clearly irrelevant, and prejudicially so. It was entirely immaterial to plaintiff's cause of action whether its agent made false representations with specific bad intent or not. If false representations were in fact made, of such a character as to reasonably excuse respondent from reading the contract, and he was thereby induced to sign it without knowing its contents, it was competent for him to rescind the same if he acted seasonably. If a person knowingly or ignorantly makes a false statement of fact in a business transaction reasonably calculated to deceive another and induce him to do that which he would not do with knowledge of the truth, and which has that effect, the act of such other is attributable to fraud and is not binding upon him unless he subsequently ratifies it with knowledge of the facts or in some other way precludes himself from rescinding it. *Miner v. Medbury,* 6 Wis. 295; *Cotzhausen v. Simon,* 47 Wis. 103, 1 N. W. 473; *Davis v. Nuzum,* 72 Wis. 439, 40 N. W. 497; *Montreal R. L. Co. v. Mihills,* 80 Wis. 540, 50 N. W. 507; *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Hart v. Moulton,* 104 Wis. 349, 359, 80 N. W. 599; *Krause v. Busacker,* 105 Wis. 350, 354, 81 N. W. 406; *Zunker v. Kuehn,* 113 Wis. 421, 425, 88 N. W. 605.

In *Hart v. Moulton* the court said:

"Our own decisions are replete with precedents where false representations of material facts, made to induce a sale, relied upon by the seller, were held sufficient to render the sale voidable at the election of the seller, and that, whether the purchaser knew or did not know the representations made by him were false, it being held sufficient if he either knew or ought to have known the truth of his statements before making them."

Speaking on the same subject in *Krause v. Busacker,* the court said:

"If the representations were material and false, and the maker thereof either knew or ought to have known that they were false, or if he made them recklessly, with no knowledge on the subject, and the injured party relied upon them as true, without the present means of knowledge of their falsity, and suffered damage thereby, then the fraud is complete."

The law being so definitely settled, to permit in a case of this kind proof of numerous independent transactions claimed to be similar in kind to the one complained of, but in no way involved in the litigation, thereby throwing the burden upon the party so attacked of meeting a multitude of collateral charges neither suggested by the pleading nor proper to be so suggested, violates some of the fundamental principles of trial evidence, and in a most prejudicial manner. Jones, Ev. § 140. In *Baker v. State,* 120 Wis. 135, 97 N. W. 566, the court discussed at considerable length the circumstances under which other occurrences than the one charged and forming the subject of the judicial investigation may be given in evidence. An examination of that case will show that the doctrine has no application whatever to a case like this. It is one that applies within very narrow limits, and the danger of exceeding the same is so great that counsel and court should be exceedingly careful in entering the field at all.

The court excluded evidence offered by appellant to the

effect that its agent, in the transaction with respondent, was innocent of any bad intent. The ruling was proper for the reasons which require the ruling of the court heretofore discussed to be condemned, though we must say the two rulings are not consistent.

Respondent testified that he supposed when the contract was signed that it was a commission agreement and refused to abide thereby upon finding that it was of a different character. For the purpose of testing his credibility in that regard he was asked by appellant's counsel these and other questions of a similar character:

"Q. You never thought of the subject of consignment until after the suit was brought, did you?"

"Q. You never thought of the word 'commission' till after this suit was brought, did you?"

All of such questions were ruled out on objections by respondent's counsel. We cannot approve thereof. Respondent's case depended upon whether he was deceived into signing a contract different from the one made verbally between him and the agent. Within all reasonable limits, cross-examination of respondent respecting circumstances calculated in any appreciable degree to throw light on that subject should have been permitted. The right of cross-examination is of great importance in discovering the truth in a judicial investigation, and should be liberally allowed so long as anything of value is called for thereby. *McMahon v. Eau Claire W. W. Co.* 95 Wis. 640, 70 N. W. 829. It seems that the court plainly unduly limited appellant's right in that regard.

The most important complaint made by appellant's counsel is because the court failed to direct a verdict in its favor and failed to render judgment in its behalf notwithstanding the verdict, because the evidence was insufficient to warrant a finding that appellant was defrauded into signing the contract. The evidence and circumstances respecting that question are in the main as follows: The contract was made

June 4, 1902, and was plain. It expressly provided that goods were not to be furnished thereunder to be sold on commission. All its features were those of a sale, not a commission, contract. In two lines immediately above where respondent signed the paper were these words addressed to appellant:

"Please ship the goods herein described, on the terms and conditions herein stated, all of which we have carefully read and find complete and satisfactory. We understand that agreements to be binding must be noted hereon."

Immediately above the signature of appellant occurred this language:

"The amount of this order is payable in four equal payments due in two, four, six and eight months from date of invoice," etc.

Under respondent's signature and in close connection therewith, in a conspicuous way, was this language, plainly intended to form a part of the contract:

"*The Standard Mfg. Co.* to send a bond to the Commercial & Savings Bank of Racine, Wis., guaranteeing a profit of at least $86.50 for one year or to repurchase any goods on hand at purchase price as above provided."

Respondent testified thus:

I did not read the contract because I hadn't the time. That is my only excuse. I didn't have the time to read the two lines over my name. I didn't take the time. My business was urgent. I did not know what the amount of the contract was. I knew I was buying some extracts and toilet articles, but how much wasn't stated. I understood I had the goods on commission. There was no rate of commission, only we were to have $86.50, which was supposed to be our profit. The agent furnished me the contract after I signed it. No one prevented me from reading it. I put it on my desk. He said I didn't have to pay for the goods till they were sold. Relying on that I consented to trade. He asked me to sign my name. I asked him if the paper contained what we had talked about and he said yes. I relied on that. He asked me

to read it. I said I had no time. I asked him if he had made the contract with others who had read the paper. He answered, "Yes, lots of them." I am sure he asked me to read the paper before I signed it. I cannot say the word "commission" or word "consignment" was used. I understood I was not to pay for goods not sold. The agent said that. I did not ask him to read the contract. It is not customary for any of us to read such contracts. He asked me to read it someway. I asked him whether it contained what we talked about, and what he said I do not know. I really could not say for sure. He asked me to read it, but in what way he expressed himself I do not know. I never read the paper he left with me.

That fails to show with any degree of definiteness that appellant's agent made any representations to respondent that the paper was written according to the verbal understanding. At the end of respondent's cross-examination, as will be seen, he said he was not sure whether such representations were made or what was said. The only thing he seems to have been sure of is that he was requested to read the paper before signing it, and that the only reasons why he did not do so were because he was too busy and because he did not usually read such papers before signing them. True, after respondent confessed that he could not say "for sure" whether any representations were made to him as to the paper being written according to the verbal agreement, a direct question was put by the cross-examiner, evidently for the purpose of showing how readily respondent would return to his first story when his attention was drawn directly to the necessity therefor, as follows: "You asked him if it contained just what you and he talked?" to which he answered: "He said yes, he knew I was busy." Under the circumstances that hardly weakened his confession that he could not say whether the agent made any representations to him or not, as regards whether the paper was drawn according to the verbal understanding. True, he said on his direct examination that he was induced to sign the paper by the representations made

by the agent, but he also said, as we have seen, that the sole reason why he did not read the paper was that he was too busy; that he was requested to read it, and was not prevented by any person from doing so, and that it was customary to sign such papers without reading them.

In view of the well-settled principle that he who alleges fraud as a ground for relief in a judicial proceeding, to succeed, must establish the charge by a preponderance of the evidence, which also must be clear and satisfactory (*Rice v. Jerenson,* 54 Wis. 248, 11 N. W. 549; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69), and that other principle that he who signs or accepts a written contract, in the absence of fraud or mistake is conclusively presumed to know its contents and to assent thereto (*Wilcox v. Continental Ins. Co.* 85 Wis. 193, 197, 55 N. W. 188), it is extremely difficult to perceive how the verdict in this case can be justified by the evidence. There is no positive, consistent evidence that any false representations were made by appellant's agent respecting the contract, and certainly none which, under the circumstances, can fairly be said to excuse respondent for not knowing the character of the paper which he signed.

The law applicable to the aspect of this case last suggested has been so recently discussed that it seems hardly necessary to go over the subject again. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932. It is there emphatically laid down that a person is bound to know the contents of a paper which he signs, no act of the adverse party or circumstance for which he is responsible occurring reasonably calculated under the circumstances to divert such person's attention therefrom, and which does so effectually. The fact that a false representation is made in respect to the paper is not necessarily sufficient to excuse such person for affixing his signature thereto in ignorance of its contents, unless

under all the circumstances, in view of his duty to give reasonable attention to the protection of his own interests, the false representation was still reasonably calculated to and did induce him not to make the investigation which he otherwise would have made. A person cannot sign a paper in ignorance of its contents and thereafter excuse such ignorance by the mere plea that he was busy or that he is habitually neglectful in such circumstances, and throw upon the courts the burden of protecting him from the consequences of his imprudence. The policy of the law is fixed to the effect that he who will not reasonably guard his own interests when he has reasonable opportunity to do so, and there is no circumstance reasonably calculated to deter him from improving such opportunity, must take the consequences. Courts do not exist for the purpose of protecting persons who fail in that regard. Where there is such inattention upon the one side and fraud upon the other, and but for the former feature the latter would not be effective, and loss occurs to the inexcusably negligent one, he is remediless; not because the wrongdoer can plead his own wrongdoing as an excuse for not making reparation, but, first, because the consequences are attributable to inexcusable inattention of the injured party; and second, because the court will not protect those who, with full opportunity to do so, will not protect themselves. Much difficulty has been experienced at times in not appreciating that there may be fraud upon one side, concurring with inexcusable ignorance upon the other, resulting in an injury, when but for the latter fault it would not have occurred, and there be no judicial remedy. That comes largely from paying more attention to eloquent passages in some judicial opinions condemning the wrongdoer—and not too severely—and condemning his attitude of confessing the wrong, so to speak, and shielding himself from the consequences, or attempting to do so, by the ignorance of his victim, than to the decision rendered and the real philosophy thereof, which will be

found, as a general rule, to be that the ignorance was in the particular case excusable, testing the conduct of the wronged party by the duty of every one to pay reasonable attention to his own interests. That difficulty is also largely attributable to the tendency of some authors to select such eloquent passages for their text instead of carefully deducing from the decision the rule of law applied in the case. A good illustration of that is the quotation relied upon by respondent's counsel from 1 Bigelow, Fraud, § 523:

"If the representation were of a character to induce action, and did induce it, that is enough. It matters not, it has well been declared, that a person misled may be said, in some loose sense, to have been negligent (in reality negligence is beside the case where the representation was calculated to mislead and did mislead); for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.' "

That was taken from the opinion of Justice DICKEY in *Linington v. Strong,* 107 Ill. 295. The point presented for decision was whether the court erred in giving the following instruction:

"The law requires every person to exercise reasonable prudence in business affairs, and before relieving a party from the obligations of a contract upon the ground of fraud, it must appear that he exercised reasonable care and prudence to learn the nature of the contract before executing it; if the defendant could read and had an opportunity to read the contract before signing, it was his duty to do so, unless induced not so to do by wilfully false statements of the plaintiffs, or one of them, as to its being a copy of the original; and if the defendant had full opportunity to read the contract before signing it, and was not induced to sign it by false statements made by plaintiffs, or either of them, the defendant would not be permitted to deny knowledge of the contents thereof."

The instruction was approved. It will very clearly be seen that it states the law quite differently from what might

be gathered from the quotation incorporated into the text by Mr. Bigelow.

We should say in passing that it is immaterial in such a case whether the statements were wilfully false or not, or whether the party making the false statements at the time thereof had any specific intent to deceive. In that respect the quoted instruction was open to serious criticism. The language of the learned judge in the opinion, which influenced the framing of the text we have taken the liberty to criticise, was evidently used forgetting for the moment the well known maxim, *"Vigilantibus, et non dormientibus succurrunt jura"* (the law assists the vigilant, not the careless). That under some circumstances the law leaves a party where it finds him, and that one of such circumstances is where one appeals for redress who is guilty of an inexcusable fault in falling into the difficulty complained of, is well settled.

Applying the foregoing to this case, admitting for the purposes thereof that there is some evidence tending to show false representations, it seems that respondent, upon his own testimony, was inexcusably ignorant of the contents of the paper he signed. He testified, in effect, that his eyesight was good, and the evidence shows that he was a business man of average intelligence and of considerable experience. A casual glance by such a person at the few lines in close connection with the signature would have acquainted him with the fact that he was not making a commission contract. A casual observation of the two lines immediately above his signature would have drawn to his attention the fact that he was signing a stipulation that he had read the contract and knew its contents and was satisfied therewith. Failure to observe those features, under the circumstances, leads to the conclusion that respondent in effect closed his eyes to what was plainly before him. He admitted over and over again that he was requested to read the paper; that the reason why he did not was because he was busy; and he said, as before

shown, that no one prevented him from reading it. There was nothing about the relations between him and the agent to lull him into security. They were entire strangers to each other, and respondent and appellant were likewise strangers. The evidence shows that he was pressed to make the deal to such a degree as should have suggested the advisability of taking time to learn what was contained in the paper before affixing his signature thereto. To sign it as he did, after being requested to read it, when a mere glance at that portion immediately connected with where his pen rested on the paper would have informed him of the nature thereof upon the vital point, and the laying of the paper away and not looking at it when he had opportunity to do so, shows inexcusable inattention to his own interests in a high degree. His excuse that it was not customary for him in signing such papers to read them, instead of tending to show that his conduct was consistent with proper care, rather indicates habitual negligence. If under the circumstances stated appellant saw fit to shut his eyes not only when he signed the paper, merely because he was busy and it was customary for him to take that course, but thereafter when there was no reason of that kind to deter him from reading the instrument, relying upon the statement of a mere stranger acting in an adversary capacity as to what it contained, he cannot well complain if the courts have not time to open their doors to afford him relief.

The judgment must be reversed and a new trial ordered. If counsel for appellant had moved the court below to change the answers to the special questions so as to conform to the evidence on the subject of respondent's negligence, the case might go back for judgment in appellant's favor. Under the established practice a mere motion for judgment notwithstanding the verdict is no more than a motion for a directed verdict or a motion for a nonsuit, or a motion to set the verdict aside and grant a new trial, as regards a final disposi-

tion of the case without a new trial, upon the judgment entered adverse to such motion being reversed upon appeal.

By the Court.—The judgment appealed from is reversed, and the cause remanded for a new trial.

SAVELAND, Appellant, vs. CONNORS and another, imp., Respondents.

February 24—March 22, 1904.

Jurisdiction: Defendants fraudulently decoyed into state: Dismissal of action: Evidence: Frauds other than that in suit.

1. Where plaintiff by fraud decoyed the defendants into this state for the purpose of bringing them within the jurisdiction of its courts, the action may, in discretion, be dismissed on that ground; and it is immaterial that plaintiff intended at first merely a criminal prosecution and not a civil action, or that, after service of process in the civil action, defendants entered appearances therein or otherwise submitted to the jurisdiction.
2. In an action to recover damages for fraud perpetrated in connection with a prize fight, defendants cannot properly be questioned, on cross-examination, as to their knowledge of, or connection with, other fraudulent sporting events.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Appeal from an order setting aside the service upon the defendants and dismissing the action. It appeared that the plaintiff, in July, 1902, had bet money upon a prize fight in Springfield, Illinois, apparently with the understanding that by collusion between the participants the one upon whom he bet was to win, but that in fact the convention between them was the reverse of his understanding, whereby his champion lost the fight and plaintiff his money; that he considered de-

fendant *Connors,* who was stakeholder, as having been in the conspiracy to delude and defraud him; that in March, 1903, thereafter, he again visited Springfield, and had an interview with *Connors* about joining in drawing some Milwaukee acquaintance of plaintiff into a similar operation to their mutual benefit, and to the partial or complete reimbursement of the plaintiff. The witnesses differ as to who suggested this plan, but agree that it was then talked over, and plaintiff admits that when it was suggested he thought he saw opportunity to get *Connors,* and perhaps some of his confederates, to Milwaukee, where he thought they might be dealt with in a less friendly spirit than that which shielded them in Springfield. Defendants claim that at that time plaintiff met defendant *McCarren,* and arranged to have him come to Milwaukee to endeavor to put the scheme in operation, though plaintiff denies this. However, late in March, *McCarren,* who was a foot racer, and one Henderson, also a foot racer, did come to Milwaukee and call upon plaintiff, whose attorney then notified the police of their presence and purpose, and plaintiff engaged with them in an ostensible scheme to draw an acquaintance of his into betting considerable sums upon a proposed foot race between them, to be run at Rochester, New York. Plaintiff, however, desired to reach *Connors,* and therefore got into communication with him by telephone, and insisted on his coming to Milwaukee to aid to "skin up a sucker." *Connors* responded with celerity, and appeared the next forenoon. He, together with the other two Springfield men, were put in communication with plaintiff's friend, and opened up their plan of a collusive foot race to him, and were decoyed into the hands of the police, who held them, upon charges of vagrancy or otherwise, in jail, for some time. Immediately after their arrest, however, summons and complaint were served upon them in this action, seeking to recover damages for fraud perpetrated on the plaintiff in the Springfield transaction. They also were

later arrested upon civil process issued in this action. The defendants entered appearances, served answers, and made certain motions consistent only with the existence of personal jurisdiction over them. The court found that they had both been decoyed into this state for the purpose of obtaining service of process upon them in this action, and in the exercise of its discretion over its own process dismissed such service and the action. From such order the plaintiff appeals.

For the appellant the cause was submitted on briefs by *Doerfler, McElroy & Eschweiler.*

For the respondents there was a brief by *Martin J. Gillen,* attorney, and *Leslie A. Gilmore,* of counsel, and oral argument by *Mr. Gilmore.*

DODGE, J. 1. The finding of the trial court to the effect that both *Connors* and *McCarren* were by plaintiff decoyed into this state for the purpose of bringing them within the jurisdiction of its courts by fraudulently holding out to them another and different purpose is supported by some affirmative evidence, and is not antagonized by that clear preponderance necessary to its reversal. Upon the fact so found was aroused the power of the court, in its discretion, to refuse its jurisdiction to a case brought within it by trickery, to purge its docket of such a disgrace. *Townsend v. Smith,* 47 Wis. 623, 3 N. W. 439; *Schrœder v. Laubenheimer,* 50 Wis. 480, 7 N. W. 427; *Moletor v. Sinnen,* 76 Wis. 308, 44 N. W. 1099; *Williams v. Williams,* 117 Wis. 125, 94 N. W. 25; *Reed v. Williams,* 29 N. J. Law, 385; *Hill v. Goodrich,* 32 Conn. 588; *Wanzer v. Bright,* 52 Ill. 35. In the last case it is said:

"The pure fountains of justice can never be so polluted. The courts were created for the administration of justice, and they and their process can never be used for the purpose of oppression and to perpetrate fraud and wrong, or their process fraudulently obtained and employed to enforce a right, however just and legal."

The power and duty of the courts to refuse jurisdiction in such cases rest not so much on the rights of the defendant as upon a duty to themselves to preserve the purity of judicial proceedings. Though the defendants here be, as suggested, of the vilest, is no reason that a court should lower itself to the attitude of an accessory in working an effective fraud upon them. It matters not that jurisdiction is in fact acquired, whether by service of the summons or by acts of the defendants in submission to such jurisdiction. *Townsend v. Smith, supra.* Neither is it significant that the purpose of plaintiff may not have included the commencement of a civil action, but merely the institution of criminal proceedings. The service of process in this action was made possible only by the fraud, and the court should therefore deny it effect. *Ibid.*

2. Error is assigned upon permitting defendants to refuse, as possibly criminating, answers upon cross-examination as to their knowledge of, or connection with, certain described fraudulent sporting events; also as to their connection with that in which plaintiff claimed to have been swindled. In such ruling could be nothing of prejudice to appellant, for such facts had no bearing or relevancy upon the only issue presented by the motion to dismiss, namely, whether they had been fraudulently induced by plaintiff to come into Wisconsin. Further, all of the former class of questions were improper under the rule of *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145, and *Paulson v. State,* 118 Wis. 89, 94 N. W. 771.

We are satisfied that the trial court rightly exercised its discretion in setting aside the service of process and dismissing the action.

By the Court.—Order affirmed.

O'NEILL, Respondent, vs. CITY OF MILWAUKEE, Appellant.

February 25—March 22, 1904.

Municipal corporations: Public works: Contracts: Mistake of city engineer: Recovery by contractor for resulting damage: Waiver.

1. Plaintiff contracted with defendant city to construct a waterworks crib and place it in Lake Michigan at a specified point, to be located by the city engineer. The work was to be done under the superintendence and to the satisfaction of the board of public works, and the city engineer (who was president of said board) was to do all the requisite surveying. The place for the crib was designated by the engineer accordingly, and plaintiff prepared the lake bottom for it, but the spot was not marked by fixed monuments. When the crib was ready to be sunk, plaintiff notified the engineer, who thereupon attempted to relocate the place previously agreed upon, and took charge of the work of sinking and placing the crib, the other members of the board being present sanctioning the execution of the work. By mistake of the engineer the crib was sunk about fifteen feet from the spot which had been designated and prepared for it, thereby causing it to lean over and rest insecurely and to be damaged by a storm occurring soon after. *Held*, that under the contract as practically construed by the parties it was the duty of the engineer to relocate the spot which had been designated for the crib, and that the city was responsible for the damage resulting from his mistake.
2. The board of public works, after being informed of the facts and notified by plaintiff that he would look to the city to make good to him the damages, insisted that plaintiff complete his contract, and he did so by moving the crib to the proper place and repairing the damage caused by the mislocation, under protest of any waiver of his claim for the extra expense. *Held*, that he did not thereby waive such claim.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Plaintiff brings this action to recover damages for an alleged breach of contract. Plaintiff and defendant city of *Milwaukee* entered into a contract on June 30, 1890, whereby plaintiff agreed and undertook the construction and plac-

ing of a crib in Lake Michigan, forming part of a new intake in connection with the waterworks system of the city. The plans for such improvement required the construction of a tunnel running from near the shore, beneath the bottom of Lake Michigan, a distance of about 3,100 feet, at which point it was planned to connect with a crib which was to be placed at the bottom of the lake, connected with the tunnel and with pipes which were to be extended to a considerable distance into the lake. Plaintiff's contract was for the construction and the placing of the crib. He undertook to construct the crib according to the plans and specifications, and to place it as required by the contract and the plans and specifications. The crib was a twelve-sided polygon, fifty-six feet in diameter, and inside was a well with a diameter of twenty feet and a depth of twenty-nine feet, with the bulkhead around the well divided into six watertight compartments. The exterior and the interior walls running to the center well, and other work, were to be built of twelve by twelve inch timbers bolted together. Through the center of the floor of the crib extended a steel tube eleven feet in diameter and seven feet long, the upper end flush with the floor and the lower end projecting two feet below the bottom timbers. The crib to be watertight in all compartments, which were to be filled with concrete after the crib was located. Plaintiff's contract required him to sink the crib at a place to be designated by the city engineer.

The charter of the defendant city, in prescribing the duties of the city engineer, provides: "It shall be his special duty to superintend and to do or cause to be done all the civil engineering required by the board of public works in the management and prosecution of all public improvements committed to their charge, and all such other surveying as may be directed by said board or by the common council," and that said engineer shall be *ex officio* a member of the board of public works, and president thereof. The charter further

provides that it shall be the duty of the board of public works to take charge and superintendence, subject to the ordinances of the city, of the maintenance of streets, alleys, bridges, and all other public grounds, buildings, and improvements, and all work pertaining thereto, and that:

"They shall have power to make contracts in the name and behalf of the city for the purposes and in the manner and under the limitations prescribed. . . . They shall perform all the duties prescribed by [the charter], and such other duties as the common council may from time to time require."

All contracts for and in behalf of the defendant city shall be awarded to the lowest bidder, under the terms and conditions of the charter, and they must be executed to the satisfaction of the board of public works under the superintendence of the board. The specifications for the work covered by the contract in this case contained these provisions:

"All the work during its progress and on its completion shall conform exactly to the lines and grades shown on the drawings mentioned in these specifications and given by the engineer in charge, subject to such modifications as the board of public works may deem necessary during its execution." "All work contemplated and described in these specifications shall be done to the satisfaction of the board of public works and city engineer." "The engineer will do all the requisite surveying for the work so as to cause as little inconvenience as possible, but the contractor will have no claim on account of delay or stoppage of the work necessitated by such surveying, and shall furnish assistance to facilitate giving lines and grades."

It was further agreed that plaintiff would execute and perform said work under the superintendence of the board of public works. He was required by the contract to prepare the lake bottom at the place designated to receive the crib, by dredging the bottom to a smooth, level bed, and to sink the crib in the place so prepared. The specifications provided that the crib should be "settled in place at a point 3,140 feet

due east from the shore shaft," to be located by the engineer, and that the parties to the contract might, by agreement, select a point in that direction, and at approximately that distance from the shaft. This point for locating the crib was changed by agreement before the plaintiff started dredging, for the reason that there were boulders in the northern portion necessary for the placing of the crib, and the point was therefore shifted thirty feet to the south. Plaintiff dredged the area so last above designated, and on December 24, 1890, notified the city engineer that he was ready to set the crib. The city engineer then marked the point by means of triangulation, and directed plaintiff to sink the crib at the point so located. Plaintiff alleges that he sunk and placed the crib as directed. It was subsequently discovered that it had been placed at a point about fifteen feet from the place agreed upon and prepared. Plaintiff charges that such misplacing was due to the carelessness of the city engineer, and caused him damages as alleged in his complaint.

This action is brought charging breach of the contract in the respect above mentioned, and claiming damages as the result of such breach by injuring the crib and causing expenditures for replacing it. The issue was referred to Hugh Ryan, as referee, on April 15, 1897, to hear, try, and determine. He made his report on December 15, 1902. The material findings were substantially as follows:

After the execution and delivery of the contract, performance thereof was from time to time duly extended until August 1, 1891. The point designated in the specifications for the location of the crib was not inserted for the purpose of definitely fixing the location, but for the purpose of ascertaining the length and direction of the tunnel as part of the waterworks intake system. At the time of the contract the point at which the crib was required to be located and sunk had not been determined, nor was it designated by any monument or object. After the making of the contract, and be-

fore plaintiff was ready to place the crib, the city engineer made, or caused measurements to be made, to ascertain and designate the point at which the crib was to be located and sunk, and marked the same by placing three buoys in a line to designate the center line of the location of the crib. Boulders at the point selected necessitated a change, and it was agreed by plaintiff and defendant that the location should be changed a few feet to the south. Thereupon plaintiff caused this area to be dredged so as to make a smooth, level place for the crib with a proper excavation at the center, about two feet in depth, for the purpose of admitting a steel tube forming part of the crib.

In dredging the lake bed the buoys were necessarily displaced, and one of them was carried away by the action of the elements. Plaintiff notified the board, but the buoys were never reset by the city engineer. On December 24, 1890, the crib was ready for sinking, and plaintiff notified the city engineer that he was ready, and had provided a sufficient number of men, tugboats, tackle, and other appliances for sinking and placing it. The city engineer, under the direction of the board of public works, with the aid of his assistants, undertook to find the point last designated and agreed upon for the location of the crib, and then and there took full charge of the work of sinking it, and caused it to be sunk at a place designated by him.

The referee specifically found:

"That said crib was not sunk on said 24th day of December, 1890, at the place which had theretofore been designated by said engineer and agreed upon . . . as the place where the same was to be sunk, and where the bed of the lake had been dredged and prepared, . . . but was sunk about fifteen feet south of said location; . . . that as said crib was sunk the north edge thereof projected over the depression in the center of the prepared ground, and was unsupported, while the south edge thereof rested upon a bank or shoulder of ground at the edge of the place which had been

dredged as the location for said crib." "That the mislocation of said crib and the sinking thereof at the place other than that prepared for it was wholly due to the mistake of the city engineer and his assistants, acting under his direction and control, in failing to ascertain and point out the spot which had theretofore been designated by said city engineer and agreed upon between the plaintiff and defendant as the place at which the said crib should be located and sunk." "That while the employees of the plaintiff were loading said crib with stone on the night of December 24, 1890, it was discovered that said crib listed, or leaned to the north. That thereupon, on the 25th or 26th day of December, 1890, the plaintiff notified the city engineer and board of public works of the defendant of the fact that said crib leaned or listed as aforesaid, and was instructed by said engineer and board of public works to proceed with the loading of said crib, notwithstanding said listing or leaning. That said crib when fully loaded leaned or listed so that the south side was about eighteen inches higher than the north side. That said leaning or listing was due to the fact that the north edge of said crib was unsupported, while the south edge rested upon a bank or shoulder of earth at the margin of the dredged space." "That on the night of December 31, 1890, a violent storm occurred, by which the said crib was greatly wrenched and injured, the cover being torn off, and the perpendicular joints at the angles, especially those on the northerly side, opened and spread apart. That the injury and damage to said crib by said storm was wholly due to the insecure and partially unsupported position in which said crib rested, by reason of such mistake of the city engineer and board of public works of said defendant, and not attributable to any negligence or lack of skill of plaintiff."

Plaintiff temporarily repaired the injury done by the storm. The board of public works at various times notified plaintiff to proceed to the completion of the crib, and on March 9, April 9, and May 19, 1891, gave him written notice to move the crib to its proper position, and to repair the same. Plaintiff protested, and claimed that the misplacement and consequent injuries were due to the mistake of the

city engineer. Before making repairs he served a notice on the defendant that he would hold the city liable for the damages caused him. In making the repairs he used large quantities of materials and appliances and employed a large number of men, and for these items expended the sum of $6,015.32. It was also necessary to purchase special machinery, which was sold for but a small part of its cost. When plaintiff offered the crib for acceptance, defendant claimed that it was defective, and put him to an expense of $2,144.94 in making an examination. For this work he rented a pump, engine, boiler, and fittings. The rental amounted to $1,410. Plaintiff spent in the superintendence of the repairs 107 days, and sixty-seven days in testing the crib for the alleged defect, and was allowed $10 per day for such superintendence. The total allowance to plaintiff by the referee amounted to $11,222.47. The referee further found that plaintiff had complied with all the provisions of the contract on his part.

The findings of the referee were approved by the court, and judgment was awarded in accordance therewith. This is an appeal from that judgment.

Carl Runge, city attorney, and *Thos. H. Dorr,* of counsel, for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *George Lines,* of counsel, and oral argument by *Mr. Lines.* They argued, among other things, that the city is liable for the mistake in the location of the crib, by which the cost to plaintiff of completing the work was increased. The board of public works is an executive department of the city government, and in the carrying out of public improvements is *pro hac vice* the city itself. Milwaukee City Charter, ch. 5, sec. 1; *Koch v. Milwaukee,* 89 Wis. 220. As to its ministerial duties in relation to work done under contract for the city, *i. e.,* its duties with respect to the giving of practical working directions, the board is,

like an architect or engineer under a private building contract, the agent of the party for whom the work is done, and such party is responsible for damages caused by the agent's defaults or neglects. *Bentley v. State,* 73 Wis. 416; *Laycock v. Moon,* 97 Wis. 59; *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122; *Seymour v. Long Dock Co.* 20 N. J. Eq. 396; *Messenger v. Buffalo,* 21 N. Y. 196; *Mulholland v. New York,* 113 N. Y. 631, 24 Am. & Eng. Corp. Cas. 612; *Horgan v. Mayor,* 160 N. Y. 516. Under a contract by which the plaintiff undertook to construct a bridge in accordance with certain plans and specifications and which imposed on the townships having control of the highway the duty to designate the location for such bridge, the contractor was held entitled to recover the cost of additional work made necessary by reason of an error of the townships' agent in pointing out the location. *Wyandotte & D. R. Co. v. King Bridge Co.* 100 Fed. 197; *Wood v. Ft. Wayne,* 119 U. S. 312; *Kellogg Bridge Co. v. Hamilton,* 110 U. S. 108; *Becker v. National P. Co.* 69 Hun, 55; *Nason Mfg. Co. v. Stephens,* 3 N. Y. Supp. 303, 127 N. Y. 602.

SIEBECKER, J. The defendant city of *Milwaukee* contends that the referee and trial court erred in finding that the plaintiff had in all respects complied with the provisions of the contract. It is argued that the evidence fails to sustain the finding that the required area of the lake bed had been dredged by the plaintiff so as to make a level, smooth place for the crib to rest on at the place designated by the city engineer under the final agreement between the parties. It is without dispute that the place originally designated by the city engineer as the place where the crib was to be located was changed by mutual consent, when plaintiff attempted to dredge the required area at this place, on account of the serious obstructions in the lake bed, and that such change of location was to a point about thirty feet south from

the location originally designated and marked by the city engineer. The court approved the finding that plaintiff properly dredged the required area of the lake bed at the place last agreed upon. This is mainly attacked upon the ground that the foreman in charge of the dredging crew stated that this dredged area was east of the original location, instead of south of it, as agreed upon by the parties and designated by the city engineer. There is considerable evidence tending to show that at the time the change was made the location of the dredge was moved to the south to the place then designated by the city engineer. Subsequent location of the area dredged corroborates the fact that the dredging was at the place designated, and about thirty feet south of the original location for the crib. Upon this state of the proof it seems that the referee and court were justified in concluding that the foreman was in error when he testified that the dredging was east, instead of south, of the original location. The evidence as to the extent of the area dredged and as to its being a smooth, level place is clearly sufficient to sustain this finding. The facts that the crib was finally placed at this point; that when so placed it rested properly and firmly upon its base, correct as to level; and that this area presented evidences of having been dredged and excavated at its center for the projecting steel tube—would almost lead to a demonstration that a sufficient area had been dredged, leveled, and smoothed at the place last agreed upon and designated by the city engineer for the location of the crib.

The main controversy raised on this appeal pertains to the alleged mistake of the city engineer and his assistants, acting under his direction and control, in failing to ascertain and point out the correct location for placing the crib at the agreed place. It appears that plaintiff notified the city engineer at the noon hour on December 24, 1900, of his readiness to sink and place the crib; that thereupon the city engineer, by aid of his assistants, attempted to point out the

exact point theretofore agreed upon and designated as the place of location; and that plaintiff had smoothed and leveled the designated area as required under the contract. In order to designate the place of locating the crib as agreed upon, the city engineer ordered two of his assistants to fixed points, from which the place of location could be determined by triangulation, and he went upon the crib, and directed plaintiff and his employees to sink it at the point at which it was placed by them on the 24th day of December. Aside from the evidence showing these facts, there is additional evidence tending to support the referee's findings that the board of public works, by and through the city engineer, as one of its members, took full charge and direction of setting the crib at the place of the lake bed as designated on the 24th day of December, and that the crib was in fact placed at the point designated by the city engineer, which was about fifteen feet south of the place theretofore fixed by agreement.

Without further specific discussion of the evidence, we find from an examination of it that the findings of the referee and the circuit court upon these points, as well as those attacked upon this appeal, concerning the questions of the crib's listing, the perfect construction and condition of the crib, the caulking of the well as required by the specifications, the injury to the crib resulting from the mistake of the engineer in failing to locate it in the place agreed upon by the parties, and the damages to plaintiff in making the necessary repair of the crib and placing it in a position to make it available for the purpose contemplated by the contract, are not against the weight of the evidence, but seem to be supported by it.

It is contended that the court erred in construing the contract in holding that it was the duty of the engineer to place and locate the crib. It is admitted that the city engineer was to do the requisite surveying for the work, and that all the work covered by the contract was to be done to the satis-

faction of the board of public works and the city engineer. The engineer had designated, conformably to the specifications, the place for the crib. This place was subsequently abandoned, and another selected by mutual agreement. This last point was not marked or designated by fixed monuments as a guide to plaintiff in completing his contract in placing and sinking the crib. It therefore devolved upon the engineer, acting for the board of public works, to ascertain and point out this place to plaintiff on December 24th. It is manifest that the parties so understood the contract from the practical construction they gave it on the day the crib was sunk and placed. Plaintiff called upon the engineer to perform this duty. He complied by taking charge of the undertaking to place the crib, and the members of the board were present, sanctioning the execution of the work. The evidence indicates that the plaintiff and the members of the board of public works understood it was the duty of the engineer to find and designate this place.

The injury to the crib, and the consequent extra expense incurred by the plaintiff to repair and place it at the agreed location conformable to the obligations imposed by the contract, were due to the default of the board of public works, representing the defendant city, in performing one of its corporate functions.

After the board of public works were fully informed of the failure in locating the crib as agreed, and were notified by plaintiff that he would look to defendant to make good to him all the damages resulting therefrom, the board insisted that plaintiff fully perform and carry out all the obligations imposed by the contract which then remained unfulfilled. The plaintiff thereafter performed his contractual obligations by placing the crib at the place agreed upon, and he repaired the injuries caused by the mislocation under protest of any waiver of his claim for extra expenses he incurred through the city's default. Under such circumstances plaint-

iff does not waive his claim for damages by proceeding to complete the contract upon demand of the defaulting party. In this situation he may perform so far as he is permitted, and recover the damages suffered from the breach. *Markey v. Milwaukee,* 76 Wis. 349, 45 N. W. 28; *McMaster v. State,* 108 N. Y. 542, 15 N. E. 417.

These considerations lead to the conclusion that the city was in default in performing its part of the contract, resulting from the mistake of the city engineer in failing to locate and sink the crib at the place agreed upon by the parties, and that such default resulted in damages to the plaintiff which he is entitled to recover in this action. *Markey v. Milwaukee, supra; Wyandotte & D. R. R. v. King Bridge Co.* 100 Fed. 197; *Horgan v. Mayor,* 160 N. Y. 516, 55 N. E. 204; *Seymour v. Long Dock Co.* 20 N. J. Eq. 396. The amount of extra expenses incurred by plaintiff in the repair of the injuries to the crib and sinking it at the agreed place, found by the referee and court, is not seriously questioned.

It is argued that the amount allowed plaintiff for his personal services is excessive and not sustained by the proof. The evidence upon the point was conflicting, and the finding must stand as not against the clear preponderance of the evidence. We find no grounds upon which any of the findings of fact can be disturbed. The judgment was properly awarded for the amount, with interest.

By the Court.—Judgment affirmed.

THE STATE EX REL. RISCH, Appellant, vs. BOARD OF TRUSTEES OF THE POLICEMEN'S PENSION FUND, Respondent.

February 25—March 22, 1904.

Appeal: Review of intermediate orders: Mandamus: *Pensions to policemen: Vested rights in fund: Constitutional law: Classification of cities: Amending charters: Costs:* Mandamus *proceeding is "action."*

1. Where the question to be determined and the judgment in a *mandamus* action would have been the same whether the case was submitted pursuant to a stipulation or upon a motion to quash the alternative writ, and the judgment of dismissal was in fact based upon the granting of said motion, an intermediate order striking out the stipulation is not reviewable on appeal from the judgment, because it is not an "order which involves the merits and necessarily affects the judgment," within the meaning of sec. 3070, Stats. 1898.
2. Continuance of a policeman in the service of a city after the enactment of a statute providing for a pension to his widow in case of his death while in such service, does not create any contractual or vested right, with reference to such pension, which cannot be taken away by subsequent legislation.
3. Where a statute in form requires police officers to pay certain sums per month out of their salaries into a pension fund, but in fact such sums are merely set apart by the city for said fund and the salaries actually paid to the officers are reduced accordingly, the moneys going into said fund do not at any time cease to be public moneys, and a police officer does not acquire any contractual or vested rights in respect to such fund prior to the happening of the particular event upon which the pension in his case becomes payable.
4. Ch. 265, Laws of 1899, "an act to create a pension fund for members of police departments in cities of the first class," expressly provided that its provisions should "be amendatory of the charter of all cities of the first class in this state containing a population exceeding 150,000;" and all conflicting provisions in such charters or any other law were repealed. Milwaukee was the only such city in the state. *Held*, that the manifest legislative intention was to amend the Milwaukee city charter, and that the new act should be exclusive, superseding and repealing prior acts (ch. 287, Laws of 1891, and ch. 379, Laws of 1895) on the same subject.

5. To the four rules stated in *Johnson v. Milwaukee*, 88 Wis. 383, relative to the essentials of a constitutional classification of cities for purposes of general legislation, should be added a fifth, to the effect that the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.
6. Such rules do not furnish a certain test by which the constitutionality of a legislative class may be determined, but the particular facts of each particular situation must necessarily be considered, it being kept in mind that the necessity and propriety for classification are primarily legislative questions.
7. The fact that, at the time of a particular enactment applicable to a class of cities, there is but one member of such class does not militate against the validity of the legislation.
8. Where cities have been classified on the basis of population, a subdivision of the first class into those having and those not having a paid police department, by an act providing for a pension fund for police officers in those having such paid department,—that feature being made the basis, in the main, of the accumulation of the fund,—is not invalid.
9. Ch. 265, Laws of 1899, was intended to apply to cities of the first class as they existed under sec. 925—1, Stats. 1898, it being clear, when secs. 1 and 17 of the act are read together, that the term "population exceeding 150,000" in sec. 17 was used by inadvertence instead of "population of 150,000 or over."
10. Although the constitution (secs. 31, 32, art. IV) has prohibited certain species of special legislation, including that for the enactment or amendment of city charters, and commanded the enactment of general laws enabling the prohibited matters to be done without direct legislative action, such method is not exclusive, and the power to legislate generally, directly affecting such matters, is the same as before.
11. The right to recover costs in an action or other judicial proceeding depends upon the statute.
12. Though not commenced by the service of a summons as provided in sec. 2629, Stats. 1898, a *mandamus* proceeding (commenced by service of the writ) is a "civil action" within the meaning of sec. 2595, and an "action" within the meaning of secs. 2918, 2920, relating to costs.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Mandamus action to compel the *Board of Trustees of the*

Policemen's Pension Fund, of the city of Milwaukee, to place the relator's name on the pension roll of the police department of said city as of the 20th day of April, 1900. The petition for the alternative writ stated that April 20, 1900, the relator's husband, William Risch, with whom she was then living, died, since which time she had remained his widow; that at the time of his death he was a policeman of said city in good standing and had been such continuously from May 4, 1886; that his compensation up to April 20, 1891, was $66.66 per month, and thereafter $80 per month and the prospective benefits guarantied by ch. 287, Laws of Wisconsin for 1891, which included the right, in case of his decease during his service for the city, of his widow to have her name placed upon the pension roll and to receive from the pension fund the sum of $30 per month; that since his death there had been ample money in the treasury of said board to pay the relator the pension stipulated in said law; that May 1, 1900, the relator demanded of the board a place upon the pension roll and payment of $30 per month as a pension from the date of her husband's death, which demand was refused, and that said board still adhered to such refusal.

On such relation an alternative writ of *mandamus* was issued and duly served upon the board. The city attorney of Milwaukee, assuming it was his duty to represent the board in the matter, duly served a notice of appearance upon relator's attorneys. The board, assuming that it was entitled to have an attorney in the matter of its own selection, duly employed Joseph B. Doe. The city attorney and the relator's attorney made a stipulation waiving all objections to the form and sufficiency of the petition upon which the alternative writ was issued, and of the writ, and agreeing to submit the matter involved to the court upon the law applicable thereto. The board, through its attorney, Mr. Doe, made due return to the writ. Later a motion was made by Mr. Doe, as such attorney, to quash the alternative writ and dis-

miss the proceedings leading up to the same, with costs, upon the ground, in part, that the allegations in the petition were not sufficient to entitle the relator to the relief sought. The city attorney filed a demurrer to the petition upon the same ground. Thereafter the relator's attorneys, upon the petition, alternative writ, and stipulation aforesaid, moved the court for a peremptory writ of *mandamus*. Thereupon an order was entered striking out such stipulation, denying such motion, and determining that Mr. Doe was the only person entitled to recognition as attorney for the board in the proceedings. Thereafter the motion to quash the writ was heard and granted, and judgment dismissing the proceedings with costs accordingly entered.

William F. Thiel, counsel, and *W. A. Hayes,* for the relator.

For the respondent there was a brief by *Joseph B. Doe,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *Mr. Doe.*

MARSHALL, J. We are asked to review the intermediate order striking out the stipulation entered into between appellant's counsel and the city attorney and determining that respondent was entitled to an attorney of its own choosing. The effect of the stipulation, if carried out, would have been to submit the question of appellant's right to a pension to the decision of the court on the facts stated in the petition. The city attorney subsequently filed a demurrer which raised the same question. The motion of the attorney employed by respondent to quash the writ raised a like question. The decision of such motion in favor of respondent is the foundation of the judgment complained of. Whether the case was submitted to the court for decision according to the stipulation or the demurrer, or on the motion, the result would necessarily have been the same. Therefore, we cannot perceive how the order sought to be reviewed, striking out the stipula-

tion, answers to the call, under sec. 3070, Stats. 1898, for "an intermediate order which involves the merits and necessarily affects the judgment." For that reason it does not seem to be necessary, nor strictly proper, to decide whether it was right or not.

It is suggested by appellant's counsel that her right to the pension under ch. 287, Laws of 1891, became fixed by the circumstance that her husband died in the service of the city as a policeman after such law became operative, leaving a widow. Sec. 8 of such law provides that:

"If any member of such fire or police department shall, while in the performance of his duty, be killed, or die as the result of an injury received in the line of his duty or of any disease contracted by reason of his occupation, or if any member of such fire or police department shall while in said service, die from any cause, . . . and shall leave a widow . . . surviving, said board of trustees shall direct the payment from said pension fund" of $30 per month to such widow while she remains unmarried.

There are some other conditions mentioned in the section, which do not need attention.

The idea advanced by counsel is that, by the continuance of appellant's husband in the service of the city as a policeman after the act of 1891 took effect, contractual relations with reference to the pension fund were created between him and the city or the pension board which could not be disturbed by any legislative enactment without violating his constitutional rights. We do not understand that there are any such relations between a municipality and its officers. In the absence of some constitutional limitation upon the right of the legislature to change such relations—and there is none in this state—they are wholly under legislative control. The compensation of municipal officers or their terms of office can be changed, or the office can be abolished altogether. The

law on the subject is well stated in 23 Am. & Eng. Ency. of Law, 228, thus:

"It is well settled in the United States that an office is not the property of the office holder, but is a public trust or agency; that it is not held by contract or grant; that the officer has no vested right therein; and that, subject to constitutional restrictions, the office may be vacated or abolished, the duties thereof changed, and the term and compensation increased or diminished."

The same doctrine was declared and applied early in this state in *State v. Douglas,* 26 Wis. 428.

The suggestion is made that, independently of the rule above stated, a right accrued to the relator by reason of her husband's having contributed out of his salary $2 per month to the pension fund. As suggested by respondent's counsel, the feature of the law in form requiring police officers to contribute to the pension fund $2 per month out of their salaries, found in ch. 265, Laws of 1899, is not found in the law of 1891, upon which appellant relies; but if it were otherwise, it does not seem that such feature would have the effect claimed therefor. While the law of 1899 and similar laws, in form, require the officers to pay a certain sum per month out of their salaries into the pension fund, they in fact are not required to do so. The contribution to the fund is made by the public out of public money. It is not first segregated from the public funds so as to become private property and then turned over to the control of the pension board, but is set aside from one public fund and turned over to another, regardless of the mere words of the law. The effect thereof is to scale down the salaries of the officers in form by so much as measures the contribution by each to the pension fund, but to really fix such salaries at the amount actually paid and to require the payment by the city into the pension fund of the amounts, per month, mentioned as being taken from the

salaries. Such amounts are no less public money after such payment than before. That would seem plain as an original proposition, but has received sanction by the highest authority, as suggested by respondent's counsel, in *Pennie v. Reis,* 80 Cal. 266, 22 Pac. 176, carried to the supreme court of the United States, and the decision there reported in 132 U. S. 464, 10 Sup. Ct. 149. A law of California similar to our law of 1899, as regards the feature now being considered, was involved. The same claim was made as that advanced here, that the contribution to the fund being required to be made by the officer out of his salary, he acquired contractual rights in the fund entitled to constitutional protection. The decision was otherwise, and that an enactment, during a policeman's term of office, changing the pension regulations to his detriment, was not a violation of his constitutional rights, because in point of fact no money was contributed by him out of his salary; that the contribution spoken of as taken from his salary was taken from money belonging to the public and retained in its possession for the creation of the fund, the amount paid to the police officer being his real salary. This language was used:

"Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property.

"Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated, . . . the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the state impaired no absolute right of property in the police officer. The direction of the state, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revoca-

tion at any time, at the will of the legislature. . . . Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority. The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization."

That seems to be decisive of every question raised upon this appeal necessary to be considered, except that of whether the law of 1891 was so modified or repealed by ch. 265, Laws of 1899, that circumstances did not exist as regards appellant, at the time of the death of her husband, answering to the calls of the later law.

There is hardly room for serious controversy but that ch. 265, Laws of 1899, was intended to cover the same subject as ch. 287, Laws of 1891, and ch. 379, Laws of 1895. Each provides for the creation of a pension fund for the benefit of policemen and their families, and the accumulation thereof to a considerable degree, at least, from the same source, to be disbursed, however, under different conditions. Two such funds derived largely from the same source for the same purpose would be too absurd to justify holding that such a system exists by legislative creation, if the law on the subject will admit of a construction that will avoid it.

The law of 1891 under which appellant claims, applied to all cities whose population exceeded 100,000 having a paid fire department. It was made, by express provision, amendatory of the charters of all cities containing a population exceeding 150,000. Ch. 312, Laws of 1893, made all cities containing a population of 150,000 or over cities of the first class. The law of 1895 was made applicable to any city having a population of 150,000 or over and a paid fire department. It expressly superseded the law of 1891 in cities of the first class, and provided for certain proceedings by the

board of trustees of the existing firemen's and policemen's pension fund, and that it should thereupon cease to exist. There was but one board then existing under the law of 1891. That was in the city of Milwaukee. There was then but one city of the first class in the state, and that was the city of Milwaukee. It follows as a necessary inference that the legislature intended by the law of 1895 to amend the city charter of such city. That is plainly manifest, satisfying sec. 4986, Stats. 1898. The law of 1899 in the first section was made applicable to all cities of the first class and in sec. 17 amendatory of all charters of cities of the first class containing a population exceeding 150,000; and all charter provisions as to such cities, and all other laws in conflict with the new act, were repealed. Thus it will be seen that the legislature was careful to make it plain that such new act, in cities of the first class, was intended to be exclusive. The first section, by necessary inference, refers, as to existing conditions, only to the city of Milwaukee. However, as a safeguard against any claim to the contrary, direct reference was made to the charters in all cities of the first class, and that was followed by language repealing all conflicting provisions, whether in such charters or otherwise.

We think the position of counsel for respondent, that the acts referred to were not intended to amend the city charter of Milwaukee, has no support. True, the city of Milwaukee was not referred to by name, but cities of the first class were, and Milwaukee was the only such city in the state. Therefore, in letter and spirit it must be said that the manifest legislative intention was to amend such city's charter.

Appellant's counsel confidently rely on this court's holding, as above indicated, respecting whether the purpose of the law of 1899 was to amend the city charter of Milwaukee, and insist that if such be its character it is void under the constitutional prohibition respecting the creation of cities or the amendment of city charters by special legislation.

Subd. 9, sec. 31, art. IV, Const. Wis. That cities may be classified according to needs that can reasonably be said to be special to each group and laws be enacted applicable to one of such classes without offending against the constitutional provision referred to, is well settled by the decisions in all states having a limitation upon legislative authority similar to the one under consideration. In *Wheeler v. Philadelphia,* 77 Pa. St. 338, 349, the court, discoursing on this subject, said:

"The power [of classification] existed at the time of the adoption of the constitution; it had been exercised by the legislature from the foundation of the government; it was incident to legislation, and its exercise was necessary to the promotion of the public welfare. The true question is, not whether classification is authorized by the terms of the constitution, but whether it is expressly prohibited."

That doctrine has received approval here on numerous occasions. *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270; *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603; *Burnham v. Milwaukee,* 98 Wis. 128, 73 N. W. 1018; *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *Wagner v. Milwaukee Co.* 112 Wis. 601, 88 N. W. 577; *Battles v. Doll,* 113 Wis. 357, 89 N. W. 187. We have no constitutional prohibition against the legislative classification of cities for the purposes of general legislation, therefore it has been uniformly held that power in that regard exists notwithstanding special legislation creating cities or amending city charters is not permitted. General legislation for cities is legislation for all or for a legitimate class thereof.

"It is not necessary, in order to make a law affecting municipal corporations a general law, that it should affect every city in the state. Cities may be classified, and, if the classification be proper, laws may be passed affecting only a single class, and such laws will be general laws, and uniform in their operation throughout the state, within the meaning of the constitution." *Adams v. Beloit, supra.*

The essentials of a constitutional classification have been stated over and over again. They were given in the form of rules in *Johnson v. Milwaukee,* thus: (1) All classification must be based upon substantial distinctions which make one class really different from another. (2) The classification adopted must be germane to the purpose of the law. (3) The classification must not be based upon existing circumstances only; it must not be so constituted as to preclude addition to the numbers included within a class. (4) To whatever class a law may belong, it must apply equally to each member thereof. Those rules have been restated on various occasions without any material change. They are very general; so much that way as not to furnish a very definite test. It would be well to add a fifth rule, to the effect that the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. That was well stated in *Nichols v. Walter,* 37 Minn. 264, 272, 33 N. W. 800, and subsequently several times approved, thus:

"The true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason,—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

With this additional rule we still do not have a certain test by which the constitutionality of a legislative class may be determined. The particular facts of each particular situation must necessarily be considered, it being kept in mind that the necessity and propriety for classification are primarily legislative questions, the judgment of the legislature not to be disturbed unless it shall clearly appear that the limits of its constitutional authority have been overstepped.

The prime distinction between cities, that has been regarded generally as calling for different legislative treatment, has regard to population. In *Adams v. Beloit* the circumstance that the constitutional amendment of 1892 left a large number of cities existing under special charters incapable of further legislative regulation by special enactment, was held to create a constitutional class composed of such cities. The same reasoning would justify such of those cities as are so circumstanced as regards population or other features as to require a code of laws substantially different from others being placed in a subclass. Cities of the type of the largest in the state before the constitutional amendment, were put in the first class. That condition has not changed. Legislation since the amendment applicable only to a single class of cities, the first as well as others, has been common and never condemned in any adjudication by this court, *Burnham v. Milwaukee* not being an exception. Similar legislation in other states has been likewise sustained.

It being established that there may be a constitutional class of cities for the purposes of general legislation, the fact that at the time of a particular enactment applicable thereto there is only one member thereof does not militate against the validity of the legislation. *Adams v. Beloit, supra.* A class, when formed, must have regard for the peculiar needs of such cities as presently do, or in the future may, satisfy the calls thereof. There may be no such city at the time of the creation of the class. Subsequently there may be many. Members may grow into the class and may drop out. The number thereof at any time does not cut any figure as regards the principles involved. The creation of a class on legitimate lines for the purposes of general legislation is one thing; the creation of a class for the purposes of a special enactment, as in *Burnham v. Milwaukee,* quite another thing. Again, the creation of a class of cities on legitimate lines for legitimate purposes is one thing, and the subdivision of such

class into different classes for legislation of a particular character, germane, however, to all members of the major class, is quite another thing, and differing also from a subclassification for the purposes of legislation to satisfy needs peculiar thereto. The law of 1899 referred to an existing class of cities created for the purpose of enabling the legislature to deal with them separately from all others; not to deal with them for a particular purpose, but for all purposes where legislation for a class was permissible at all. Applying the principles stated, it is difficult to see how such act can be condemned as unconstitutional.

Counsel cite many authorities to our attention to support their position, but none condemning the classification of cities for the purposes of general legislation primarily according to population, each class being distinct from all others so as to reasonably suggest a necessity for different legislative treatment, and condemning legislation for one of the classes so established, though in the particular matter other classes might well be dealt with in the same way. *Hibbard v. State ex rel. Ward,* 65 Ohio St. 574, 64 N. E. 109, to which counsel refer with confidence, deals with an enactment that was not designed ever to apply to but one city. The law was condemned for that reason, in conformity to the holding of this court in *Burnham v. Milwaukee.*

Counsel contend that the act of 1899 subdivided the cities of the first class into those having a paid police department and those not having such a department, thereby making a class not based on population, and for a particular species of legislation, hence that it violates the first and second of the rules heretofore stated, and the doctrine of *Verges v. Milwaukee Co.* 116 Wis. 191, 93 N. W. 44, suggesting that generally the primary distinction in classifying cities is difference in population. The primary distinction in the law under discussion is in population; so if that were essential, it is satisfied. The next distinction is in regard to the paid police department feature. That would seem to be such a

marked difference as to fully satisfy the calls for a real distinction between the members of one class and those of another, since such feature is made the basis, in the main, for the accumulation of the pension fund.

Further, it is said that the law does not apply even to all cities of the first class having a paid police department; that it is limited to all such having a population exceeding 150,000. Counsel refer to the language of sec. 17. It seems quite clear that the legislature, by the use of the term "population exceeding 150,000," intended to refer to cities of the first class created by ch. 312, Laws of 1893, and incorporated into sec. 925—1, Stats. 1898, but inadvertently used the term "exceeding 150,000" instead of "150,000 or over." Sec. 17, as before indicated, doubtless refers to the same cities as sec. 1. By reading sec. 1 in connection with sec. 17, it seems quite clear that both refer to cities of the first class as they existed at the time of the enactment, and that it did not make a subclass of cities of the first class, as regards population.

Counsel suggests for our consideration the question of whether, since the constitution prohibits certain species of special legislation, including that for the enactment or amendment of city charters, and commands the enactment of general laws, enabling the prohibited matters to be done without direct legislative action, such method is not exclusive. We think that must be answered in the negative. The legislature, within the limitations of the federal constitution, is supreme except as otherwise provided in the state constitution. That prohibits certain special legislation, the prohibition being accompanied with a requirement for an indirect general method of doing the things prohibited; but power to legislate generally, directly effecting such matters, is the same as before.

The foregoing seems to render other points discussed in the briefs of counsel unimportant. In our judgment the law of 1899, as regards appellant, refers to the law of 1891, is

valid, and repeals it. As the circumstances of the death of appellant's husband were such as to entitle her to a pension under the law of 1899 only in case prior to his death he had served upon the police force of the city of Milwaukee fifteen years, and he had not so served, the respondent had no power to place her name upon the pension roll and the judgment complained of in that regard cannot be disturbed.

The point is made that the court erred in rendering a judgment for costs against appellant. The question of costs in *mandamus* actions was left in some doubt in *State ex rel. School Dist. v. Wolfrom,* 25 Wis. 468; *State ex rel. G. B. & M. R. Co. v. Jennings,* 56 Wis. 113, 14 N. W. 28, and *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 70 N. W. 300. In the first case cited the court said:

"Costs for the proper fees and charges of officers and all necessary disbursements follow judgment, as a matter of course, in proceedings of this nature. They are taxable under the general provisions of statute, though, perhaps, not attorney's fees allowed to parties in civil actions."

Why costs of one character were allowable and not those of another was not suggested. Costs do not follow a judgment as a matter of course in proceedings of this nature, or any other, in the absence of some statute on the question. As has often been said, the right to reasonable costs in an action or other judicial proceeding is a creature of the statute, it not being understood that English statutes on the subject were a part of the common law adopted in this country. *Wis. Cent. R. Co. v. Kneale,* 79 Wis. 89, 48 N. W. 248; *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786. The court said, in *State ex rel. G. B. & M. R. Co. v. Jennings* and *State ex rel. Buchanan v. Kellogg, supra:*

"A proceeding by *mandamus* is essentially a suit, and when issue is joined by the return it becomes a civil action, within the meaning of the statutes, and as to the form and sufficiency of the several pleadings must be governed by the same rules which prevail in other civil actions."

The court used the quoted language in both cases with reference to the general character of *mandamus* actions respecting pleadings and proceedings. True, a *mandamus* proceeding is a suit, from the aspect of the old practice. The court so said in *State ex rel. Durner v. Huegin,* 110 Wis. 189, 224, 225, 85 N. W. 1046. But, strictly speaking, under our Code practice we have no such thing as "suits," although we commonly use that term. We have only actions and special proceedings. What were formerly denominated suits in equity and actions at law are now denominated "civil actions." If a *mandamus* proceeding is in any sense a suit, it partakes of the nature of an action. In the absence of some special statute declaring a particular proceeding to be an action, the supreme test is sec. 2595, Stats. 1898, which provides that an action is an ordinary proceeding in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Sec. 2596, Id., provides that every other remedy is a special proceeding. True, sec. 2629 provides that an action shall be commenced by the service of a summons, and secs. 2630 and 2631 specify what the essentials and substantially what the form thereof shall be; and as such sections seem to refer back necessarily to sec. 2595, if we were not to look further it would appear that no proceeding could be denominated an action unless required to be commenced by a summons. The statute declares that there is no remedy under our system in any matter of a civil nature other than a civil action or a special proceeding. A *mandamus* proceeding is not, strictly speaking, a special proceeding, nor analogous thereto. In the latter there is nothing in the nature of a complaint and answer, with issues of law or fact, or both, to be tried as actions ordinarily are tried, as is the case in *mandamus.* Ch. 148, Stats. 1898. Therefore, the latter must be treated as an action in some respects under sec. 2595.

The grant of power to circuit courts to use writs of *habeas corpus* and *mandamus* among other common-law writs, contemplates their use for the purposes they were devoted to before the adoption of the Code, in the commencement of suits, within the broad meaning of that term, as said in *State ex rel. Durner v. Huegin.* This essential characteristic has not been and cannot be changed by any legislative enactment. Hence, though strictly speaking, as said in *State ex rel. Durner v. Huegin,* a suit or action commenced by the issuance of a writ of *mandamus* is not a civil action tested by secs. 2630 and 2631, Id., it is such within the broad meaning that must be given to sec. 2595. In harmony with that, commonly, under the Code, proceedings whereby the respondent is cited by writ of *certiorari, mandamus,* or *habeas corpus,* have been spoken of as actions and treated in most respects like actions commenced by summons. Therefore the service of a writ of *mandamus* must be deemed to all intents and purposes the commencement of an action. True, it takes that form more perfectly after a return to the writ than before; but if it must then be deemed an action, as said in *State ex rel. Buchanan v. Kellogg* and *State ex rel. G. B. & M. R. Co. v. Jennings, supra,* it follows logically, it seems, that the service of the writ is the commencement of the action, not the making of the return thereto.

The term "action" in the costs statutes, secs. 2918 and 2920, was evidently intended to be understood in the same sense as "action" in sec. 2595 as regards civil matters. The purpose thereof was to give to the prevailing party in any civil action costs, except as otherwise expressly provided. There is no provision otherwise as to actions of this kind. It follows that the court rightly granted costs to respondent as in ordinary actions, and that the judgment should be in all respects affirmed.

By the Court.—The judgment is affirmed.

BREMER, Appellant, vs. PLEISS and another, Respondents.

February 25—March 22, 1904.

Negligence: Passenger elevators: Door partly open: Contributory negligence.

A guest in an hotel, familiar with the elevator, which was in a dark corner and not lighted in the daytime, approached it, having in mind the question whether the car was there or not, but it was too dark for him to see, although he looked. The door stood about half open. He pushed it open with his shoulder, stepped in, and fell down the shaft. A few moments before, he had stepped into the car through the door, which was then fully open. *Held*, that he was guilty of contributory negligence as a matter of law.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries resulting from falling down an elevator shaft. The accident happened on the 26th day of August, 1899, at about 11:30 o'clock a. m. The defendants on and prior to that day were proprietors of a hotel called the Schlitz Hotel, in the city of Milwaukee, in which there was an elevator for the convenience of patrons. The plaintiff was at that time, and for several weeks prior thereto, a guest at said hotel, and had been in the habit of using the elevator. It appeared by the testimony of the plaintiff that on the day named he came into the hotel with a friend named Koenig; that they walked into the office, and the plaintiff obtained the key of his room; that they then stepped to the elevator, and finding the door open, walked in (the car being there), and rang for a bell boy to take them upstairs; that no bell boy came, and Koenig suggested they go into the barroom of the hotel and have a glass of beer, which they did; that when they returned to the office, a few minutes later, a bell boy was sitting on a bench near the elevator; that the plaintiff was ahead of Koenig, and

arrived at the door of the elevator first. The plaintiff testifies with regard to the situation at this time as follows:

"Came back again in a few minutes. There was then no boy in the car. Could not see any boy, except on the bench. Could not see any car. I stepped in. The door was open wide enough for me to step in. I do not know how far the door was open. I did not measure it. It might have been half open. I do not know how far. I might have pushed it with my shoulder in stepping in. . . . When Mr. Koenig and I came from the barroom, I intended to go to my room, and intended to use the elevator. *Q*. As you approached the elevator, did you have your mind on the question whether the car was there? *A*. Yes, sir. *Q*. And did you look to see if it was there? *A*. It was too dark. Could not see anything. I looked for the elevator, made a step, and fell down. I looked for the elevator while I was stepping in. I looked before I stepped in—looked at the open hole there. I did not see the car. I did not notice it. I saw the bell boy was on the bench. I did not see any bell boy in the shaft. It was dark in the shaft. I did not see anything. *Q*. How long before you stepped down was it that you looked into the open door and could not see anything there? *A*. I don't know. I think, one step. *Q*. When you looked into the door, you could see no car and no boy. If you had stopped, you would not have fallen, would you? *A*. I expect I would not have fallen. I never seen the elevator door open when the car was not there. . . . *Q*. What did you say was the fact as to the position of that elevator door when you and Koenig went there—whether it was clear open or partly open? *A*. It was about half open. I pushed it with my shoulder, stepping in. I did not push it open with my hands. I did not touch the door with my hands, to my knowledge."

The plaintiff further testified, in substance, that it was so dark at the door of the elevator that he could not see whether the car was there or not in the daytime. The fact is that no car was there, and the plaintiff fell down a distance of about nine feet, to the bottom of the elevator shaft, and was seriously injured. The negligence claimed is the leaving of the

elevator door open in a place where it was so dark that one could not see into the elevator shaft. Koenig was called as a witness, and corroborated the testimony of the plaintiff as to their stepping into the elevator shaft the first time, and waiting, and then going to the barroom for a glass of beer. On the return, Koenig testifies as follows:

"He [*Bremer*] went first. I followed him right up. Went through the same place we had before. *Mr. Bremer* got to the elevator, to the lower part of the hall or office, and it was kind of dim. I followed him. I could not see all that was going on, because got to have a light in a dim place. All at once I heard a shriek. I went up, and lay forward. There was a hole perfectly dark. I looked down, and I heard him moan below. . . . It was not light enough for me to see. It was dark. I would call it dark when I went in the second time. . . . When *Bremer* walked ahead of me, I was behind, and he walked on till he got to the elevator. All I know, he stepped in there and fell down. That's all I recollect."

It further appeared that the plaintiff signed a written statement about ten months after the injury, and before he was recovered therefrom, in which he said:

"When I got there the door was partly open. Thinking the elevator was there, I pushed the door back to the west, and stepped into the shaft. The door was open about eight or ten inches when I pushed it back."

The plaintiff claims, however, that at the time of the signing of this paper he did not know what he was doing.

At the close of the plaintiff's testimony the defendant moved for a nonsuit, and the same was granted, on the ground that the evidence showed the plaintiff to be guilty of contributory negligence. Judgment for the defendants being rendered, the plaintiff appeals.

M. C. Krause, for the appellant.

For the respondents there was a brief by *Joseph B. Doe,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *Mr. Doe.*

WINSLOW, J. There was doubtless ample evidence tending to show negligence on the part of the defendants in the management of this elevator. The plaintiff's evidence tended to show that it was located in a dark corner of the office room, and so arranged that in the daytime it was nearly or quite impossible to see into the shaft; that no light was maintained either outside of the shaft or inside of the car during the daytime; and that on the occasion in question the door of the shaft was left partway open when the car was not there. This court has said that it is the duty of the proprietors of passenger elevators to see that they are "properly and safely constructed, and operated with the highest degree of skill and care commensurate with or proportionate to the possibility of injury to passengers in the use of such elevators" (*Oberndorfer v. Pabst,* 100 Wis. 505, 76 N. W. 338), and this is in accord with the law universally laid down by the courts. But as it is not claimed that the evidence was insufficient to take the question of defendants' negligence to the jury, it is unnecessary to spend time upon it. The question presented is whether the court was right in holding that the evidence showed the plaintiff guilty of contributory negligence as matter of law. The facts as shown by his own evidence were that he was very familiar with the elevator, and knew that it was in a very dark place and was not lighted in the daytime; that he approached it, having in mind the question whether the car was there or not; that before stepping in he looked at the open hole, and saw no car, because it was dark; that the door was only partly open—about half open—and that he pushed it open with his shoulders and stepped in; that only a few moments before he had stepped into the car through the door, which was then fully open. Upon these facts, is there a question for the jury? There is no doubt that, when a door to an elevator shaft is thrown open by the attendant, that very act constitutes an invitation to enter. *Tousey v. Roberts,* 114 N. Y. 312, 21 N. E. 399; *Oberndorfer v. Pabst,*

supra. So it has been held that, where the door is fully open and the shaft is dark, the question whether a passenger is guilty of contributory negligence in stepping in without examination is one for the jury. *People's Bank v. Morgolofski,* 75 Md. 432, 23 Atl. 1027; *Southern B. & L. Asso. v. Lawson,* 97 Tenn. 367, 37 S. W. 86; *Dawson v. Sloan,* 49 N. Y. Sup. Ct. 304, affirmed in 100 N. Y. 620. We have found no case, however, holding that where the door to the shaft is only halfway open, so that the passenger entering is obliged to, and does, open it the rest of the way in order to enter, the question of contributory negligence is a matter of doubt; nor do we see how it could be so held. It seems to us entirely clear that the fact that the door is only partway open is a definite and unequivocal advertisement that something is wrong—certainly not an assurance that the car is there. The use of passenger elevators is now so universal that all know that when an elevator car is brought to a standstill, ready for passengers to enter or leave, the door is always thrown wide open. A door only halfway open is a plain suggestion of some unusual condition—a hint to investigate, not an invitation to enter or an assurance of safety. In this view of the evidence, we think the nonsuit was rightly granted.

By the Court.—Judgment affirmed.

TURTENWALD, Appellant, vs. WISCONSIN LAKES ICE & CARTAGE COMPANY, Respondent.

February 25—March 22, 1904.

Negligence: Wanton injury: Pleading: Theory of case on appeal: Injury to street cleaner: Negligence of driver: Contributory negligence.

1. Mere proof of an injury caused by ordinary negligence is not sufficient to establish a cause of action for a wanton injury; and in an action for the latter plaintiff cannot recover for the former, if seasonable objection is made.

2. Where both parties have treated an action as one to recover for ordinary negligence, this court will so treat it, although the complaint charges that the negligent act was also reckless, wilful, and malicious.
3. The driver of an ice wagon who allows his team to proceed along the street without guidance, while his entire attention is devoted to preparing the ice for delivery, cannot be said as a matter of law to be free from negligence if the team runs against and injures a person on the street.
4. Plaintiff, a street cleaner, whose duties required him to move about on the street without taking any particular course and to make frequent trips to the side of the street to empty his shovel, was working to the westward on the south side of an asphalted avenue and had just turned to the left to go to the curb when he was run down by the team attached to an ice wagon proceeding westward without guidance from the driver, who was otherwise engaged. *Held*, that plaintiff's failure to look for teams approaching from behind him was not contributory negligence as matter of law.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action for damages for a personal injury. The claim of plaintiff was that September 25, 1900, he was working on Grand avenue between Twentieth and Twenty-First streets in the city of Milwaukee as a street cleaner; that while on the south side of the avenue and so circumstanced as to pay attention to teams traveling east, and not expecting one going west to be using that side of the street, the north side being the proper way for such teams, defendant's servant, in charge of one of its ice wagons drawn by a span of horses, carelessly, recklessly, negligently, wilfully, and maliciously drove them west on such south side at great speed, striking plaintiff, throwing him to the ground, running over, and greatly injuring him, to his damage in the sum of $6,000.

Defendant answered denying the allegations of negligence and pleading settlement of plaintiff's pretended cause of action, he being paid $150 in full for all claims he had or pretended to have, growing out of the alleged circumstance.

The evidence, in the most favorable view for plaintiff, is to this effect: On the day he was injured, defendant's servant, in charge of one of its ice wagons as alleged, was in the performance of his duties, assisting in the delivery of ice to defendant's customers at the place alleged. He had charge of the team and was expected, in addition, to cut ice into suitable forms for delivery. He had two assistants who carried the ice to the customers. The crew came upon the avenue from Twentieth street, turning to the left. The horses proceeded along the south side of the avenue near the curb, and without being guided by any one, from the time the turn was made from Twentieth street till the accident occurred. The driver, instead of paying attention to his team, was back of the seat cutting ice, the horses being allowed to go as they pleased. One of the deliverymen was in the wagon waiting to take the piece of ice which the driver was in the act of preparing when the accident occurred. Some little time before the accident the deliverymen saw plaintiff at work in the street a little north of the pathway of the team, pushing his shovel. Just before the horses reached him, seeing danger of his being injured, the deliveryman called "Whoa," and reached for the lines, but before he could stop the horses the accident occurred. Plaintiff's evidence, in one aspect of it, tended to show that he was working in the pathway of the horses for some time before he was injured, and that no attention was paid by the persons in the wagon as to whether they ran him down or not till it was too late for them to prevent the accident.

Defendant's evidence tended to show that some little time before plaintiff was injured he was going west with his shovel some distance north of the pathway of the horses; that the men in the wagon saw him but did not apprehend danger of his being injured, as he was some distance north of the course the horses were taking; that when he got his shovel loaded he suddenly turned to the left, passing right in front of the

horses to empty his shovel on a pile of litter near the curb, and that before the deliveryman could stop the team the accident occurred.

At the close of the evidence, on motion of defendant's counsel the court directed a verdict for defendant, and judgment was rendered accordingly.

Harry M. Silber, attorney, and *Robert N. McMynn,* of counsel, for the appellant.

For the respondent there was a brief by *Fiebing & Killilea,* and oral argument by *William F. Adams.*

MARSHALL, J. The complaint admits of a construction charging defendant with being guilty of a greater wrong than mere failure to exercise ordinary care,—with actual intent on the part of the driver, or that disregard for the safety of persons lawfully in the street amounting to the same thing, to drive the team upon appellant, and that defendant is answerable for the wrong. There are some indications that such was the purpose of the pleader. Counsel *ex industria* proved that the teamster was kept in respondent's employ for some two years after the accident and not discharged on account thereof. While the complaint contains language in one aspect charging the teamster with the high degree of wrong indicated, there is no allegation that respondent ratified the act. Evidence was allowed on that point, but there was no evidence indicating wanton conduct on the part of the teamster. If we were to view the complaint as stating a cause of action for damages caused by gross negligence, so called, in any aspect of the case, the nonsuit would necessarily have to be approved, since mere proof of an injury caused by breach of duty to exercise ordinary care is not sufficient to establish a cause of action for a wanton injury, and a person cannot be permitted in an action charging the latter to recover for the former, if seasonable objections are made. *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536. How-

ever, on the whole it seems the parties on both sides, notwithstanding the peculiar language of the complaint, treated the action in the court below and in this court as one to recover compensation for damages attributable to ordinary negligence. In that situation it seems we are warranted in treating the case in the same way, notwithstanding the charge of negligence is coupled with charges of reckless, wilful, and malicious conduct. It would be far safer in drafting a complaint in an action like this, to appreciate that a claim for an injury wantonly inflicted is one thing, and one for an injury attributable to mere actionable negligence is a far different thing (*Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446), and if it is desired to state a cause of action of the latter character, the pleader should omit all such words as "wilful," "reckless," and "malicious," as regards the conduct of the defendant.

There is no claim, as we understand it, but that there was evidence from which the jury may reasonably have found negligence on the part of respondent's servant which was a proximate cause of the injury appellant received. The fact that such servant allowed the horses to proceed along the street without guidance, his attention being entirely diverted from them by reason of his performing the labor of preparing the ice for the deliverymen, thereby throwing upon other persons lawfully using the street the entire burden of keeping out of the way of the horses, is too suggestive of negligence to warrant holding to the contrary as a matter of law.

The argument of counsel indicates that the trial court viewed the evidence as conclusively showing that appellant was traveling west on the avenue somewhat north of the pathway of the horses, shortly before he was injured; that had he kept on his course, and the horses had kept their course and overtaken him, he would have been in no danger; and that the accident occurred by reason of his suddenly turning to the left into the pathway of the horses to empty his shovel

where litter previously gathered had been deposited. It seems that counsel for respondent appreciate that the rule adopted was at least not free from doubt, as they invoke the rule stated in *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 38, 73 N. W. 573, that ordinarily a trial judge in deciding whether the evidence in any reasonable view of it will support a verdict in favor of the plaintiff has some advantages over an appellate court, and that such circumstance, in doubtful cases, is entitled to considerable weight upon appeal. That cannot cut any figure in this case further than to support the learned judge's conclusion that appellant suddenly stepped in front of the horses and was run down by them before the teamster had time to stop them. Assuming that such was appellant's course, can we say as a matter of law that he was guilty of contributory negligence? Should we say that a street cleaner must be constantly on the alert to keep out of the way of teams coming from either direction and that if while at work in the street he steps aside from a direct course without looking behind him to see if there is a team coming from that direction he is guilty of want of ordinary care as a matter of law? That would be rather a severe rule. Appellant was absorbed with his duties. The noise of his shovel, as he pushed it along the surface of the street, might well excuse him for failing to observe the approach of the team by the sense of hearing. So it comes down to this: Is want of ordinary care to be conclusively inferred merely because appellant turned to the left to empty his shovel without looking to see if there was a team approaching from behind him? It is considered that such proposition must be answered in the negative. Probably the trial court did not give proper significance to the circumstance that appellant's duties required him to move about without any regard to taking any particular course along the street, and to make frequent trips to the side of

the street to empty his shovel; that his situation was quite different from that of an ordinary traveler upon the street.

By the Court.—The judgment appealed from is reversed, and the cause remanded for a new trial.

HELLER, Appellant, vs. CLARKE and another, Respondents.

February 26—March 22, 1904.

Justices' courts: Criminal jurisdiction: Milwaukee police court: Constitutional law: Void proceedings: Liability.

1. Sec. 5, ch. 6, Laws of 1895, divesting justices of the peace in the city of Milwaukee of jurisdiction in criminal cases, and vesting such jurisdiction in the police court of the city, applies to offenses committed outside of the city, but within the county, as well as to those committed in the city.
2. Such legislation does not contravene sec. 2, art. VII, Const.
3. When justices of the peace act in cases of which they have no jurisdiction their proceedings are void and they become trespassers, and as such are liable to any person injured by their acts.
4. A warrant showing upon its face that the justice issuing it has no jurisdiction is no protection to an officer making an arrest thereon.

APPEAL from a judgment of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Reversed.*

This is an action to recover damages for an alleged false imprisonment. Defendant *Clarke* was a justice of the peace in and for the city and county of Milwaukee, and defendant *McEvoy* was a constable who performed services in Justice *Clarke's* court. On December 8, 1900, complaint was made before defendant *Clarke,* as justice of the peace, against plaintiff, charging that he did on November 14th, in the village of East Milwaukee, commit an assault with intent to

do great bodily harm, and with going armed with a concealed dangerous weapon. The defendant *Clarke,* as justice of the peace, issued a warrant for plaintiff's arrest, and he was arrested by defendant *McEvoy* upon this complaint and warrant, brought before defendant *Clarke* for examination, and after such examination the complaint charging him with going armed with a dangerous concealed weapon was dismissed, but he was bound over for trial, for the offense of an assault with intent to do great bodily harm, to the municipal court of Milwaukee. He was admitted to bail in the sum of $300. On his refusal and default to furnish bail, he was committed to the county jail to await trial. Within an hour after commitment, a writ of *habeas corpus* was obtained, and upon a hearing on the writ plaintiff was discharged.

Previous to the enactment of sec. 5, ch. 6, Laws of 1895, the criminal jurisdiction of justices of the peace in the city of Milwaukee was limited to offenses committed in the county outside of the city of Milwaukee. Under ch. 6, Laws of 1895, the police court of the city of Milwaukee was created, and given exclusive jurisdiction of offenses against city ordinances, and of such misdemeanors as arose in the city and which were triable before justices of the peace, and to arrest and hold over for trial all persons committing offenses not triable before justices of the peace, the same as justices of the peace might otherwise do. Sec. 5 of this act provides:

"SECTION 5. No justice of the peace or court commissioner in said city of Milwaukee shall exercise any jurisdiction in criminal cases, but all such jurisdiction is vested in said police court, and all examinations, recognizances and commitments for trial from said police court, and from the other justices of the peace of the county of Milwaukee, in criminal cases not triable before justices of the peace, shall be certified, returned and made to the municipal court of the city and county of Milwaukee instead of to the circuit court, at or before the time fixed for the appearance of the accused.

All such cases shall thereafter be prosecuted and tried in said municipal court as provided by law in similar cases in the circuit court, and all general provisions of law relating to criminal actions, proceedings and examinations before justices of the peace shall apply to said police court so far as applicable."

The cause was tried twice. In the first trial the verdict was set aside because contrary to the law and the evidence. On the second trial a verdict was rendered for plaintiff, and finding compensatory damages. This verdict was set aside and judgment ordered for defendants. This is an appeal from that judgment.

For the appellant there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

For the respondents there was a brief by *W. H. Stafford,* attorney for respondent *Clarke,* and *Churchill & Donovan,* attorneys for respondent *McEvoy,* and *Nath. Pereles & Sons* and *C. F. Hunter,* of counsel, and oral argument by *Mr. Hunter.*

SIEBECKER, J. This appeal presents the question whether the defendant *Clarke,* as a justice of the peace in the city of Milwaukee, had jurisdiction to hear, try, and determine the charge preferred against the plaintiff for an assault and battery alleged to have been committed within the county but outside of the limits of the city of Milwaukee. In *Gilowsky v. Connolly,* 55 Wis. 445, 13 N. W. 444, it was held that, under the constitution of the state, the legislature had the power to deprive justices of the peace in cities and villages of jurisdiction in criminal cases, and vest the jurisdiction in other tribunals. The grounds of this decision need not be repeated. The results of that case were affirmed in *Shaffel v. State,* 97 Wis. 377, 72 N. W. 888. The *Gilowsky Case* determined that the legislation pertaining to the jurisdiction of the municipal court for Milwaukee county which enacted that "no justice of the peace or court commissioner

within said city shall exercise any jurisdiction in any criminal cases, but all such jurisdiction is vested in said court and the judge thereof," did not contravene any of the provisions of the seventh article of the constitution, vesting judicial power in certain courts, among which are justices of the peace, and providing for their election, and that "the justices thus elected shall have such civil and criminal jurisdiction as shall be prescribed by law."

In the subsequent case of *Shaffel v. State,* it was held that ch. 23, Laws of 1895, which created a municipal court for the western part of Waukesha county, called the "Municipal Court for the Western District of Waukesha County," and the provisions of the act divesting justices of the peace in that district of all jurisdiction "in cases of crimes or misdemeanors or breaches of any village or city ordinance, arising within the limits of said county," etc., and vesting it in this municipal court, was valid legislation. The contention of respondents that the jurisdiction of justices of the peace, elected in the city of Milwaukee, over offenses committed outside of the city but within the county could not be vested in the police court, upon the ground that it deprives such justices of jurisdiction outside of the judicial district for which this court is created, is met by the *Shaffel Case.* The act then under consideration deprived justices within the judicial district comprising a part of the county of criminal jurisdiction throughout the county, and vested it in the court of such district. The reasons now advanced against the validity of such legislation suggest no valid grounds to our minds for holding that the conclusions of those cases should not be adhered to. We must hold the justices of the peace of the city of Milwaukee were divested of all criminal jurisdiction under the provisions of the act creating the police court of the city of Milwaukee, and such jurisdiction was vested in that court. It follows that the defendant *Clarke,* as justice of the peace, had no jurisdiction to issue a warrant for ap-

pellant's arrest and to cause him to be taken into custody as set out in the above statement of facts, and that the process was absolutely void.

The trial court held that defendants were not liable because the justice acted in good faith in issuing the process upon the complaint made before him, and causing the plaintiff to be arrested and bound over for trial. The court, it seems, was led to this holding in considering that the recent case of *Robertson v. Parker,* 99 Wis. 652, 75 N. W. 423, modified the rule of former cases in this court, under which justices were held liable in damages to persons who had been taken into custody upon void process issued in their official capacity. The case fails to sustain this interpretation both in its facts and in the terms of the decision. The facts show that the defendant in that case was sought to be held liable to the plaintiff in that action upon the ground that he, as judge of the municipal court of Douglas county, issued a warrant for plaintiff's arrest to answer the charge of abandoning his wife, that he was arrested, brought to trial, and sentenced to imprisonment by the defendant as judge of such court. In law this court had no jurisdiction to try and sentence the accused in that case, but had jurisdiction to cause him to be apprehended and held to bail or committed for trial. It will be observed that the magistrate had jurisdiction to cause the apprehension of the accused and bind him over for trial, but exceeded his powers when he tried and pronounced sentence upon him. This decision particularly discriminates between cases where the magistrate acts wholly without jurisdiction, and those wherein, through judicial error, he takes some steps in the proceeding in excess of his powers. The court says:

"There is a distinction running through many of the cases between a proceeding instituted and carried on by a magistrate, where the initial proceeding failed to secure jurisdiction, or, having secured it, he had lost it by neglect of legal

requirements, and those where jurisdiction has been secured, and, during the progress of the investigation, the magistrate, in view of the situation, decides that he possesses greater power than he actually possesses;" citing *Brosde v. Sanderson,* 86 Wis. 368, 57 N. W. 49; *Frazier v. Turner,* 76 Wis. 562, 45 N. W. 411; and *Lueck v. Heisler,* 87 Wis. 644, 58 N. W. 1101, as sustaining the rule that a magistrate is liable to the party injured by the void process.

These and other cases must be deemed to settle this question in this court to the effect that, when justices of the peace act in cases of which they have no jurisdiction, their proceedings are void, and they become trespassers, and as such are liable to any person injured by their acts. *Gelzenleuchter v. Niemeyer,* 64 Wis. 316, 25 N. W. 442; Cooley, Torts (2d ed.) p. 492.

The warrant upon which plaintiff was arrested showed upon its face that it was issued to apprehend the accused for an offense over which the justice had no jurisdiction, and the officer was bound to know its invalidity. It affords no protection to him in making the arrest. *Lueck v. Heisler,* 87 Wis. 644, 58 N. W. 1101. The plaintiff was entitled to judgment upon the verdict for the amount of the damages found, with costs.

By the Court.—The judgment of the superior court of Milwaukee is reversed, and the cause remanded with directions to award judgment in favor of the plaintiff in accordance with this opinion.

WARD, Respondent, vs. RUSSELL and another, Appellants.

February 26—March 22, 1904.

Deeds: Delivery: Agency of depositary: Death of grantor: Sale of land: **Bona fide** *purchaser: Possession.*

1. **Where a person, in expectation of death, executes a conveyance and places it in the hands of a depositary for delivery after his death, but reserves the right to reclaim the instrument in case he gets well, there is no delivery, and the agency of the depositary to make delivery terminates with the grantor's death.**
2. **Although the vendor of land and of personalty had record title to the land and apparent title to the personalty under bills of sale, the facts that the land was not in her possession but in the possession of the heir of a person under whom she claimed, and that the personalty was held by the special administrator of said person, are sufficient to put the purchaser, having knowledge of such facts, upon inquiry as to the vendor's actual rights.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

One Cassius C. Ward, apprehending speedy death, on April 5, 1902, executed a deed of all his real estate and a bill of all his personalty to Walter C. Ward, a brother, and placed them in the hands of one Parkinson, to be delivered to his brother in case he died. On the same day, in pursuance of understanding between him and Cassius, Walter C. Ward executed a quitclaim deed and a bill of sale of one half of said realty and personalty to the appellant *Melissa E. Russell,* a sister, which also were left with the notary for delivery to her after delivery of the deed and bill of sale to Walter. Cassius died May 9, 1902, unmarried, childless, and leaving no father; the plaintiff, his mother, being his sole heir at law. Thereupon, within about a week, the depositary delivered the several deeds and bills of sale, and

the former were at once duly recorded by the grantees. On June 27th the appellant *Russell* executed a deed and bill of sale of her interest to the appellant *Hogan;* the transfer being consummated not until about July 6th. On July 31, 1902, the plaintiff commenced this action to cancel both of said deeds of realty on the ground of fraud and undue influence, and also on the ground of nondelivery. The former ground was substantially abandoned, and after trial the court made findings negativing the delivery of the deed, and charging *Hogan* with notice of plaintiff's rights, and entered judgment barring the defendants from any right or title in the land, and setting aside both of the deeds. From that judgment the defendants *Russell* and *Hogan* appeal.

For the appellants there was a brief by *Ryan, Merton & Newbury,* and oral argument by *E. Merton.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *J. V. Quarles, Jr.*

DODGE, J. The plan for deeding his property was arranged between Cassius C. Ward and the attorney, Parkinson, at a private interview. Accordingly the latter prepared deeds and bills of sale, and on the next day went to Ward's sickroom, called in some or all of the parties interested, and there took execution by Cassius of the deed and bill of sale to Walter, and affixed his own certificate of acknowledgment. Parkinson explained the arrangement to all present, whereupon, at some time during the interview, after the signature, and while the papers were in the manual possession of Parkinson, Cassius said, "I suppose if I get well I can get these papers back from you," to which Parkinson assented, and Cassius said that he would come round for them after he got well. The principal contention is whether a completed, absolute delivery of these papers had been made before this reservation was imposed, or, on the contrary, that reserva-

tion was a part of the instructions under which they were deposited. The testimony is not at all clear on the subject. There seems to have been little said, other than a rehearsal by Parkinson of the plan arranged the day before. The express assent of Parkinson and the silence of the appellant *Russell,* who was present, are both confirmatory of the general understanding that the transaction was not closed at the time of the quoted remarks. There is no proof of the formalities by which the papers came to be then in Parkinson's hands. Of course, after signature by the sick man in bed, they would naturally have been taken by the notary for witnessing and certification, and his mere possession would not necessarily prove more than such an act. In presence of this uncertainty, the trial court has found that this reservation of right to reclaim the papers was part of the instructions under which deposit was made. We cannot find any clear preponderance of evidence to the contrary, and feel constrained to sustain that finding.

The law applicable to the state of facts so found is not doubtful, nor, indeed, seriously disputed. Retention by the grantor of right of control over the papers in the possession of a depositary deprives the manual tradition of effect as a delivery. The papers are still held by the latter merely as agent for the former, and therefore in legal effect by him. Such agency is terminated by the grantor's death, and delivery thereafter to the grantee is unauthorized and of no effect. *Prutsman v. Baker,* 30 Wis. 644; *Williams v. Daubner,* 103 Wis. 521, 79 N. W. 748.

The court has found that appellant *Hogan* had notice of facts and circumstances to put him to investigation which would have disclosed plaintiff's rights. This finding is supported by evidence that *Mrs. Russell* was out of possession at the time of her sale to him, and that apparently plaintiff was in possession of the land, and a special administrator of

Cassius C. Ward held the personal property. *Hogan* offered no evidence of ignorance on his part. We must sustain this finding of fact also.

We thus reach the conclusion that the judgment, having support in findings not themselves contrary to the evidence, is correct.

By the Court.—Judgment affirmed.

MENDEL, Appellant, vs. SCHOOL DISTRICT NUMBER SIX OF THE TOWN OF WAUWATOSA, Respondent.

February 26—March 22, 1904.

School Districts: Contracts: Evidence.

1. A contract for the employment of a janitor for a district school can be made only by the district board at a meeting thereof duly called and held.
2. The best evidence of the acts of a school board is the record of its meetings, kept by the clerk.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

For the appellant there was a brief by *W. C. Zabel,* attorney, and *W. B. Rubin,* of counsel, and oral argument by *Mr. Zabel.*

For the respondent there was a brief by *Wheeler & Perry,* and oral argument by *L. G. Wheeler.*

WINSLOW, J. The plaintiff sued for damages for breach of a contract to serve defendant as janitor. He claimed that he was employed by the district board in the latter part of November, 1899, to serve as janitor for the balance of the school year beginning December 11, 1899, at the rate of $25 per month. It was admitted that he served for one month

beginning December 11, 1899; that he was paid in full for that month; and that the district board refused to allow him to work longer, although he held himself in readiness to do so. The trial court nonsuited the plaintiff because he failed to prove the entire contract which he claimed, and there can be no question as to the correctness of the ruling. No written contract was produced, but the plaintiff proved that in the latter part of November, 1899, the plaintiff's wife, acting as his agent, handed to the director of the district a written bid to do the work of janitor of the school for $25 per month; that a meeting was held by the board two or three days later, and that after the meeting the director met the plaintiff's wife, and told her that the bid was accepted, and the plaintiff went to work on the 11th of December, and did the work for a month, and was paid therefor. This was substantially all of the plaintiff's proof. It does not show or tend to show the entire contract, which the plaintiff must show in order to recover. The contract could only be made by the board, and the board could only act at a meeting duly called and held. Sec. 432, Stats. 1898; *School Dist. v. Baier,* 98 Wis. 22, 73 N. W. 448. The best evidence of the acts of the board must be the record of its meetings, kept by the clerk. The record was not offered, nor was its absence explained. It would be a novel idea that the acts of a public board could be proven by the unsworn statements out of court of one of the members of the board. Authorities need hardly be cited to refute such an idea.

By the Court.—Judgment affirmed.

KRANIGER, Appellant, vs. SCHMIDT and another, Respondents.

February 26—March 22, 1904.

Deeds: Undue influence: Appeal: Questions of fact: Written decision.

1. A finding of the trial court that a conveyance of land was not executed as the result of undue influence, is *held* not against the clear preponderance of the evidence.
2. Ordinarily, where the only question raised on an appeal is whether the findings of fact are against the clear preponderance of the evidence, and that question must be answered in the negative, the filing of a decision in writing in strict compliance with sec. 2410, Stats. 1898, is all that is required or advisable.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to set aside a deed upon the ground of undue influence. The issues raised by the pleadings will sufficiently appear from the findings of fact. The court determined that upon these circumstances the legal rights of the parties depended: February 23, 1903, at the age of seventy-two years, Henry Schmidt died. He left surviving him the plaintiff, *Mary Kraniger,* his only child, who resided with her husband in a home of her own, she having two lawful children, Frank aged fifteen years, and Josephine aged seven years; *Anna,* a grandchild aged twenty-two years and unmarried, who was also his adopted daughter and had resided with him from infancy; a brother, defendant *Berthold Schmidt,* aged sixty-two years, having a family of seven and not able to work; and Emanuel Schmidt, a half-brother, who was also married and had a large family. His wife died in August, 1902. At the time of his decease he possessed real estate described, worth $7,500. His wife died seised of certain real estate described, worth $2,800. At one time she was possessed

of other realty which, prior to her decease, without the knowledge of her husband, she conveyed to a religious association. She was the beneficiary named in a $2,000 policy of life insurance upon her husband's life, which, in case she did not survive her husband, was made payable to the daughter *Anna*. Henry was appointed administrator of his wife's estate, and executed the trust till he died. At her death plaintiff became the owner of the real estate of which the former died seised, subject to Henry's right by curtesy. He claimed that all the realty of which she died seised, and that which she theretofore conveyed away as aforesaid, was purchased with his money and really belonged to him. He insisted thereon when he was informed that she had made the conveyance, and up to the time of his last sickness, when he was endeavoring to induce the grantee to deed the property to him. *Anna* did not become his adopted daughter till after his wife's death. In January, 1893, he was in failing health. He had suffered a stroke of paralysis. He made an ineffectual attempt to make a will January 17, 1903. The next day he informed his nephew, *Berthold Schmidt,* his half-brother and others, that he desired to provide for the disposition of his property, and asked them to be with him the next day accompanied by a notary for that purpose, indicating what disposition thereof he intended to make. Accordingly such persons, accompanied by a notary and the daughter *Anna,* attended Henry as requested. He then made a deed to *Anna* of the land in controversy, subject to a charge of $1,500 in favor of defendant *Berthold Schmidt.* The deed was duly delivered and was thereafter duly recorded. At the time the deed was made the deceased also made a will devising all the realty of which his wife died seised to the plaintiff, and the realty conveyed by his wife as aforesaid, in case it should be recovered, to his daughter *Anna,* and in form bequeathed to plaintiff the $2,000 policy of life insurance, requiring her to pay out of the proceeds thereof a

$900 mortgage on the land conveyed to *Anna*. He did not in the will attempt to dispose of the land so conveyed. At the time of making such will and conveyance he was of sound mind and competent to make the disposition of his property which he attempted to make, and was not moved in the matter by undue influence.

The conclusion of law reached was that the deed made to *Anna* vested in her a good and indefeasible title to the land described therein, subject to the $1,500 charge in favor of *Berthold Schmidt,* and that defendants were entitled to a judgment accordingly, and dismissing the complaint with costs. Judgment was so rendered, from which this appeal was taken.

For the appellant there was a brief by *Sheridan & Wollaeger,* and oral argument by *J. A. Sheridan.*

For the respondents there was a brief by *Timlin & Glicksman,* attorneys, and *W. L. Gold,* of counsel, and oral argument by *Mr. Gold.*

MARSHALL, J. No new question of law is presented, nor old one applied, which is in controversy. We have only to deal with the question of whether the deed given by the deceased to his daughter *Anna* was the result of undue influence. The disposition of the policy of life insurance is not involved. Whether the judgment respecting the deed is right depends solely upon whether the findings of fact are against the clear preponderance of the evidence. No good will result, directly or indirectly, from a discussion of the evidence for the purpose of justifying the conclusion at which we have arrived. It is considered that ordinarily, where there is no other question raised upon an appeal than that of whether the findings of fact are against the clear preponderance of the evidence, and it appears that such question must be answered in the negative, the filing of a decision in writing in strict compliance with sec. 2410, Stats. 1898, is

all that is required and all that is advisable. The evidence in the record upon this appeal has received careful consideration from all the aspects presented by appellant's counsel, and all others legitimately to be considered, and it seems to warrant the conclusions of fact complained of. Therefore the judgment must be affirmed.

By the Court.—So ordered.

EHLEITER, Administrator, Respondent, vs. CITY OF MILWAUKEE, Appellant.

February 27—March 22, 1904.

Highways: Injuries from defects: "Momentary" loss of control of horse: Appeal: Changing special verdict: New trial.

1. A horse which, after shying at an electric car, ran sixty feet or more along the street in spite of the driver's efforts to stop him, is *held*, as matter of law, to have been more than "momentarily uncontrolled," within the meaning of that expression as used in the rules of law respecting liability of municipalities for injuries caused by defects in their highways.
2. Where the trial court erred in refusing to change the answer to a question in a special verdict, this court on appeal may direct that such change be made and judgment rendered accordingly, without a new trial.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Action for damages by death of Michael Hart, caused by a defect in highway, under following circumstances: Between 3 and 4 o'clock a. m. of April 7, 1901, Hart was driving a reasonably quiet horse in front of a buggy containing himself, wife, and daughter, southward on Kinnickinnic avenue, toward a point where a swing bridge crossed the Kinnickinnic river, with which he was entirely familiar,

having driven over same daily for many months. The bridge had been open, undergoing repairs, for perhaps an hour. There was no barrier, and the only signal was a red light on top of the bridge, instead of a white one, which indicated that the bridge was open. Decedent drove at a trot—whether rapid or moderate is in conflict—until he reached a point about ninety feet north of the bridge, where an electric motor car was stationary, or nearly so, whereupon, according to the testimony of plaintiff's witnesses, the horse shied at the car and started forward in a run, which was continued until he plunged into the river. A watchman stationed to guard the bridge rushed into the street about twenty-seven feet north of the bridge and shouted warning, which, however, had no effect. Other witnesses testify that the horse was not frightened, but continued a rapid trot from some 250 feet north directly down to the bridge. Those who testify that the horse was running away also testify that the deceased was exerting every effort to stop him but was unable to do so. The jury found, by special verdict: (1) Inadequacy of guard to the bridge; (2) which was the proximate cause of the injury; (3) that the horse, at and immediately prior to being driven into the river, was beyond decedent's control; (4) that he was no more than momentarily uncontrollable; (5) that decedent could not, by the exercise of ordinary care, have known that the bridge was open; and (6) that he was not guilty of any want of ordinary care. At the close of the trial, defendant moved to set aside and reverse the answers to each of these questions, which motions were all overruled, and judgment rendered for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Carl Runge,* city attorney, and *Thos. H. Dorr,* special assistant, of counsel, and oral argument by *Mr. Dorr.*

For the respondent there was a brief by *Toohey & Gilmore,* and oral argument by *J. L. Gilmore.*

DODGE, J. Upon the trial of this case two sharply conflicting theories were presented and supported by evidence: First, that the decedent drove more or less rapidly toward the bridge, with his horse under control, until he reached or passed the watchman, and was then unable to stop before going into the river, upon which theory it was claimed he was guilty of contributory negligence, under the rule laid down in *Stephani v. Manitowoc,* 101 Wis. 59, 76 N. W. 1110; secondly, it was contended by the plaintiff that before reaching the bridge the horse became uncontrollable, and while so plunged into the chasm in the highway. The jury, by answer to the third question, found that the horse was beyond control at and immediately prior to the time intestate drove into the river. This necessarily must be understood as adopting the plaintiff's theory. That being assumed, the defendant insists that there is no evidence to support the answer to the fourth question, that such loss of control was only momentary. This theory of the driver's loss of control of the horse rests upon the testimony of two witnesses to the effect that, as he passed an electric motor car at a point approximately ninety feet from the bridge, the horse was frightened, shied, and from that point ran or galloped uncontrolled along the street to and into the river. There is no other evidence whatever of any loss of control, or any change in the conduct or pace of the horse, from a point at least two or three hundred feet away. Thus is presented the question whether a horse can, by any reasonable possibility, be said to be only momentarily uncontrolled while running a distance of eighty or ninety feet along a highway, in the sense in which that expression is used in the law laid down on the subject of liability of municipalities for defects in their highways.

The rule was early established in Massachusetts and Maine that such liability of municipalities is special and statutory; that only where the defect in the highway is the sole, proxi-

mate cause of the injury is such liability imposed, and that if there concurs therewith another proximate cause, for which the municipality is not responsible, there is no liability; and that the running away of a horse is such independent cause, unless itself produced by fault of the town. The principle is also otherwise stated that by the statute municipalities are only made liable to those using the highway in the ordinary manner for purposes of travel, and that a runaway team is not within that use. Wisconsin, whose highway statutes were taken from Massachusetts, early adopted, also, this construction of what is now sec. 1339, Stats. 1898, and has persistently adhered thereto. *Jackson v. Bellevieu,* 30 Wis. 250; *Schillinger v. Verona,* 96 Wis. 456, 71 N. W. 888; *Ritger v. Milwaukee,* 99 Wis. 190, 74 N. W. 815; *McFarlane v. Sullivan,* 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; *Johnson v. Superior,* 103 Wis. 66, 78 N. W. 1100; *Titus v. Northbridge,* 97 Mass. 258; *Higgins v. Boston,* 148 Mass. 484, 20 N. E. 105. The courts of both states have, however, recognized what may be called an exception to the foregoing rule, in that one driving the streets in the ordinary manner may be subjected to peril by a defect, such as a declivity or lack of railing, by a sudden or spasmodic movement of the horse, usually a shying or falling, causing immediate contact with the defect, provided the failure of the driver to control the horse is only momentary. *Houfe v. Fulton,* 29 Wis. 296; *Olson v. Chippewa Falls,* 71 Wis. 558, 37 N. W. 575; *Schillinger v. Verona, supra; Ritger v. Milwaukee, supra; Wright v. Templeton,* 132 Mass. 49, 51; *Hinckley v. Somerset,* 145 Mass. 326, 332. 14 N. E. 166; *Scannal v. Cambridge,* 163 Mass. 91, 38 N. E. 790. Generally such cases as sustain the exception relate to a sudden swerving or shying of the horse—one of them, at least, to a sudden sickness, staggering, and falling, and two of them to a sudden backing up from fright. In all, however, great insistence is placed upon the idea that the injury must so accompany the sudden,

spasmodic, and unexpected movement of the horse that the failure to control is but momentary, in the strictest sense of that word. Indeed, this phrase has sometimes been adopted to express the idea: "If a horse . . . merely shies or swerves, . . . so that the driver does not in reality lose control over him." Elliott, Roads & Streets, § 615. Generally it may be said that the event sought to be described is wholly inconsistent with a condition where a horse is moving along the road in the course of a struggle for mastery. It is substantially limited to those spasmodic movements which often occur while the horse is generally within the control of his driver, but where the particular movement is so quick and unexpected that it and its results take place before efforts to control can be exerted. Unfortunately most words are in some degree elastic and are used with variant meaning under differing circumstances, and the word "momentary" is no exception. It is apparent from the judge's charge, not excepted to, that his conception of the idea was merely the antithesis to "permanent." Within the definition given in that charge, any period of struggle between a frightened horse and his driver would be momentary until he became a runaway, completely escaped from the driver's mastery, as an established and permanent condition. Obviously such a moment might permit a run along a highway for a long distance, the driver unable to stop or guide the horse, and yet struggling to do so, with prospect of ultimate success. It is not to be denied that such a conception can be gained from definitions of "momentary loss of control" found in some of the cases above cited, but examination of the events as to which courts were speaking will negative any such meaning. Such cases illustrate the futility of attempting any definition of such a word as "momentary," which alone and undefined is likely to convey a more accurate idea than any substitutionary phrase. It is particularly incorrect to use the word as merely antithetic to "perma-

nent," so as to convey the idea that until the horse has become a runaway, as a permanent condition, he may still be deemed only momentarily uncontrolled. This is to give to the word "momentary" the meaning of "temporary." It is true, as respondent urges, though only within some limits, that the momentary character of the uncontrolled movement of the horse is not necessarily decided by the distance he moves. It is doubtless impossible to say how far a frightened horse may spring before his driver can bring to bear efforts to control him. Nevertheless there is a limit within human experience beyond which such movement cannot possibly go. Thus in *Olson v. Chippewa Falls,* 71 Wis. 558, 37 N. W. 575, and *Hinckley v. Somerset,* 145 Mass. 326, 14 N. E. 166, the courts refused to hold, as matter of law, that a frightened horse might not momentarily reach a defect twenty feet away. In the latter case, however, it was said that sixty feet was beyond any such possibility, the horse's movement being backward. In the following cases a forward movement over the specified distances was held more than momentary, though not entirely because of the distance traveled: Sixty-five or seventy feet (*Titus v. Northbridge,* 97 Mass. 258); forty-six feet (*Ritger v. Milwaukee,* 99 Wis. 190, 74 N. W. 815); seventeen feet (*Scannal v. Cambridge,* 163 Mass. 91, 39 N. E. 790).

In the present case the horse first shied to one side, and then started forward in a gallop. According to plaintiff's witnesses, the deceased practically at once pulled back on the lines so that the traces were loosened, and the horse traveled at least sixty or seventy feet drawing the vehicle by the bit, and resisting the efforts to stop his forward movement. It cannot be doubted that when the horse recovered from his swerve, and started upon a forward course in resistance to the efforts to stop him, the momentary escape from control contemplated by this rule of law was over. Thenceforward he was a runaway horse, and that, too, wholly without re-

gard to whether ultimately he could have been stopped by his driver. The travel along a street for sixty, seventy, or eighty feet after a fright we must hold, as matter of law, is wholly inconsistent with momentary absence of control, as the expression is used in the rule of law permitting liability of a municipality for injuries so occurring.

The views thus declared result, of course, in the conclusion that the fourth question should have been answered "Yes," and that the trial court erred in denying appellant's motion to strike out the negative and insert an affirmative answer. That conclusion being reached, and no reason appearing why a new trial is necessary, our duty is to order done that which ought to have been done, namely, to make the change and render judgment accordingly. This decision renders unnecessary consideration of certain other errors assigned by appellant.

By the Court.—Judgment reversed, and cause remanded with directions to grant defendant's motion to amend the special verdict by changing the answer to the fourth question therein from "No" to "Yes," and, upon the verdict as so amended, to render judgment for the defendant.

STRACK, Respondent, vs. CITY OF MILWAUKEE, Appellant.

February 27—March 22, 1904.

Injury from defective sidewalk: Who is a traveler: Contributory negligence: Knowledge of defect.

1. The occupant of a corner building who, upon returning home at night and finding the front entrance locked, went upon the sidewalk around the corner to a side entrance, was a traveler upon the street within the contemplation of sec. 1339, Stats. 1898, giving a right of recovery for injuries sustained by reason of any insufficiency or want of repair in a street.

2. Plaintiff was injured at night by stepping into a hole in the sidewalk near his dwelling. The night was dark, and the street lights had been extinguished. Plaintiff had for some time known, generally, of the defective condition of the walk at or near the place of accident, but did not at the time have it in mind, as he was thinking of the serious nature of the illness of a friend he had just left. *Held*, that the question of contributory negligence was properly left to the jury.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

This is an appeal from a judgment in favor of respondent for damages and costs in the sum of $2,482.74. The action is brought to recover damages for personal injuries sustained by respondent by falling on the sidewalk in the street of appellant city at about 9:30 o'clock on the evening of July 11, 1901.

Respondent prior to the date of the accident had for some time occupied a portion of a building at the northwest corner of Twelfth and Wine streets, in the city of Milwaukee. The building had three stories. The third story was occupied by a photograph gallery. The first story, fronting on Twelfth street, was occupied by respondent as a saloon, over which his family resided, and through which they were accustomed to pass in going to their living rooms above. The only other means of access to these living rooms was by a stairway on Wine street. The rear portions of the first and second stories were rented to two different families, who used the Wine street entrance.

When plaintiff arrived at his home on the evening of the accident, he found the Twelfth street door leading to his apartments locked, and he returned to the street, to go to the Wine street entrance. When walking on the sidewalk, and about to turn to enter the building, he caught his foot in a hole in the sidewalk, and was thrown to the ground, sustaining the injuries for which he claims damages in this action.

The seriousness of the injuries is unquestioned. The defective condition of the sidewalk and appellant's notice thereof are admitted. Respondent had been aware, generally, of the defective condition of the walk for several months before the accident, and it is alleged that his want of ordinary care contributed to produce the accident and injuries.

Carl Runge, city attorney, for the appellant, to the point that, the plaintiff not being such a traveler as is contemplated by the statute, the defendant is not liable, cited *Harper v. Milwaukee,* 30 Wis. 365; *Reed v. Madison,* 83 Wis. 171; *Toutloff v. Green Bay,* 91 Wis. 490; Wharton, Negligence (2d ed.) 767, § 991; *Richards v. Enfield,* 13 Gray, 344; *Leslie v. Lewiston,* 62 Me. 468; 2 Thompson, Negligence, 755; Shearman & Redf. Negligence, §§ 370, 713; *Ball v. Winchester,* 32 N. H. 435; *Stinson v. Gardiner,* 42 Me. 248; *Willard v. Cambridge,* 3 Allen, 574; *Peck v. Ellsworth,* 36 Me. 393; *Gilman v. Laconia,* 55 N. H. 130; *Sykes v. Pawlet,* 43 Vt. 446; *Steele v. Boston,* 128 Mass. 583; *McDougall v. Salem,* 110 Mass. 21; *Kellogg v. Northampton,* 4 Gray, 65; *Burt v. Boston,* 122 Mass. 223–227; *Atwill v. Blatz,* 118 Wis. 226, 95 N. W. 99; *Mellen v. Morrill,* 126 Mass. 545, 546; *Carleton v. Franconia I. & S. Co.* 99 Mass. 216; *Cole v. McKee,* 66 Wis. 500; *Dowling v. Nuebling,* 97 Wis. 350.

For the respondent there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

SIEBECKER, J. Respondent was injured on the evening of July 11, 1901, by falling on the sidewalk in the street adjacent to the building occupied by him as a tenant. It appears that he was called to the house of an acquaintance, some distance from his home and place of business, at about 8 o'clock in the evening. Upon his return, at about 9 o'clock, he found the entrance to his saloon and dwelling apartments locked. Being unable to enter, he returned to the sidewalk,

went to the south corner of the lot, and then westward on the sidewalk for about sixty feet, to a point near the side entrance. Near this entrance, and when he was about to turn toward the steps leading to the side entrance door, he stepped into a hole in the board sidewalk, causing him to fall, and resulting in the injuries of which he complains. Respondent had known, generally, the defective condition of the walk at or near the place of accident for some time before the accident occurred. He testifies that he was thinking of the serious nature of the sickness of the friend he had just left, and did not at the time have in mind the defective condition of the walk. He also stated that the street lights were extinguished at the time, and that the night was dark, on account of a foggy mist. The defect consisted of a hole in the board walk. It also appeared that there were a number of similar defects in the walk near the place of accident, and that these had existed for some months. The appellant city offered no testimony in the case.

It is contended that respondent was not a traveler upon the street, as contemplated by sec. 1339, Stats. 1898, giving persons the right to recover damages for injuries sustained by reason of any insufficiency or want of repair in a street. This is asserted upon the ground that respondent was a tenant of a part of the building abutting upon the street in question, and was using the sidewalk merely as such occupant of the abutting premises, and not as a traveler upon the public highway. Respondent used the walk, as shown by the evidence, in all respects the same as persons ordinarily use sidewalks, and his mode of travel did not differ from the use he made of the sidewalks in passing over them on his previous trip that evening It is not disputed but that he retraced his steps from the entrance door to his apartments of the building to the sidewalk, then walked upon it for the purpose of passing to the corner of Twelfth and Wine streets, thence westerly for about sixty feet to the point of his desti-

nation, and before turning from his travel he came in contact with the defect in the street. Under such circumstances, respondent must certainly be deemed to be using the streets for the ordinary purposes of a traveler, and any injury caused him by an insufficiency or want of repair will entitle him to recover the damages resulting to him, if free from any want of ordinary care contributing to the result.

It is urged the court should have directed the jury to find upon the evidence that respondent was guilty of contributory negligence. It is unnecessary to give further details of the evidence upon this branch of the case. The case presents a state of facts from which it cannot be said that respondent's want of ordinary care in traveling on the street at the time and place in question is clearly established. As stated in *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087:

"The law is that if a person knows of a dangerous defect in a sidewalk and is injured thereby, it is presumed, in the absence of evidence to the contrary, that he remembered it and was negligent, but that the presumption is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the question of plaintiff's contributory negligence."

Upon the facts and circumstances of the case, the court properly submitted this question to the jury. We find no error in the case.

By the Court.—Judgment affirmed.

WYSOCKI, by guardian *ad litem*, Respondent, vs. WISCONSIN LAKES ICE & CARTAGE COMPANY, Appellant.

February 27—March 22, 1904.

Master and servant: Injury by vicious horse: Vice-principal or co-employee? Evidence of authority: Impeachment of witnesses: Improper remarks of counsel: Instructions to jury: Excessive damages.

1. In an action for injuries to a boy employed by an ice company, caused by the kick of a vicious horse which he had been directed by one G., another employee, to hitch to a cart for the purpose of hauling ice, the evidence is *held* to sustain a finding in the special verdict that G. had authority to represent the company in designating the particular horse to be used in the work.
2. Upon the question whether G. had such authority, evidence that employees consulted him as to their duties and the repair of instruments was admissible.
3. It being the duty of the company to furnish only reasonably safe horses to be used by its employees in its business, and it appearing that the horse in question was vicious and had a propensity to kick persons, that such propensity was known to G. before the accident, and that in respect to this matter G. was not a mere co-employee of plaintiff, but was a vice principal, charged with performance of the master's duty, the company is responsible for the consequences of G.'s want of ordinary care in that regard.
4. To permit an impeaching witness to be asked whether the witness sought to be impeached used certain particular language out of court, "or words of like meaning," was not error, on the ground that it made the witness the judge as to whether the words used were of "like meaning," since by cross-examination the opposing party might ascertain the precise words used.
5. Remarks of counsel in commenting to the jury upon the evidence are *held*, though technically objectionable, not to have been prejudicial.
6. For the trial court to state that instructions are given at the request of one party or the other, though not ordinarily ground for reversal, is not advisable practice.

7. For the total loss of one eye and impairment of the other and injury to bones of the face, forehead, and skull, leaving an unevenness of surface, necessitating removal of a part of the bone covering the brain, and causing continued pain and discomfort, an award of $8,500 is *held* not excessive.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was brought to recover damages for a personal injury. Appellant is a corporation engaged in cutting, storing, delivering, and selling ice in the city of Milwaukee, and had been so engaged for a number of years prior to the alleged injury. Respondent was a servant of appellant, working in and about its icehouse. At the time of the injury he was fourteen years of age. On July 28, 1900, he was directed by one of appellant's employees to harness and hitch one of its horses to haul slush ice from the icehouse. He harnessed the horse as directed, and, when about to grasp the lines in order to drive the horse to the cart, it kicked him, striking him in the face and causing the loss of an eye and other serious injury to his head and face. It is alleged that appellant failed in its duty of providing him with a safe horse, as an appliance wherewith to do his work, in that the horse named "Nigger" was vicious and had a propensity to kick, making him dangerous and unsafe to use in appellant's business. Respondent had no notice of, nor was he warned of, its vicious and dangerous propensities and unsafe condition. Upon these grounds it is claimed that appellant was careless in providing him with this horse.

The jury, by special verdict, found the following facts: The respondent was injured by the kick of appellant's horse while in its employ. Ben Germershausen, an employee of appellant, who directed respondent to harness and use this horse in hauling slush ice from the ice house, had authority from appellant to select the horse to be used in this work.

Germershausen knew prior to July 28, 1900, that the horse was vicious and had a propensity to kick at persons. The jury also found that before the accident this horse had a vicious disposition to kick at persons, which rendered him not reasonably safe to harness and use; that appellant, by the exercise of ordinary care, would have discovered this disposition of the horse before the accident happened; that want of ordinary care on appellant's part to furnish a reasonably safe horse was the proximate cause of the injury; and that respondent was not guilty of any want of ordinary care, contributing to the injury. They found that $8,500 would compensate respondent for his injuries. The court awarded judgment for this amount, with costs. From this judgment this appeal is taken.

C. H. Van Alstine, for the appellant, contended, *inter alia,* that after the master has furnished several horses for use in his business he does not owe to his servants a further implied duty to determine which of such horses his servants shall use. The selection of a horse from several already furnished by the master is clearly a detail of the work which may properly be delegated to a fellow servant without creating any liability on the part of the master. *Webber v. Piper,* 109 N. Y. 496, 499; *Van den Heuvel v. National F. Co.* 84 Wis. 636.

For the respondent there was a brief by *Casimir Gonski* and *Kronshage & McGovern,* attorneys, and *Oscar M. Fritz,* of counsel, and oral argument by *Mr. Gonski* and *Mr. Theo. Kronshage.*

SIEBECKER, J. Respondent, a boy fourteen years of age, was in appellant's employ at the time he was injured from the kick of one of the horses used in its business, and sustained serious injuries. It is not questioned but what appellant owed respondent the duty to exercise reasonable care in furnishing him a reasonably safe horse for his use in its

business. A vital question, under the facts of the case, is whether Ben Germershausen, one of the appellant's employees, had authority to act for it in directing respondent to use the horse designated by him in performing the duties imposed by the service. In awarding judgment, the court held that the answer to the third question in the special verdict, finding Germershausen had authority to represent appellant in designating the particular horse respondent should use in his service, is supported by the evidence. It is in proof that Germershausen had been in appellant's employ for a number of years, that he owned stock in the company, and that, as stated by the president of the company, he performed the service of keeping things in order in the absence of the officers and superintendent. At such time he directed other employees as to the service they were to perform, and superintended them in their work. He employed respondent, and on different occasions he employed other men for appellant. He testified, as to his duties, that he at times had charge of some of the men. On the morning of the day of this accident, none of the officers nor the superintendent in charge of the work at the icehouse and barn were present when respondent came to his work. Germershausen was there, and assumed the management of affairs in his usual way. Respondent testifies that he usually received his orders from Germershausen as to the particular work he was to do, and what horse to use. Other servants testify to the same effect as regards his hiring of employees, directing them in their work, and conducting appellant's business in the absence of the officers and superintendent, and particularly in directing the work and selecting the horses to be used in hoisting and in hauling ice and slush. It is not disputed that respondent was directed by Germershausen to harness and hitch the horse Nigger to a cart to haul slush ice at the time the injuries were sustained. The evidence bearing on the nature and the manner of conducting appellant's business

sustains the conclusion of the court that Germershausen was not a mere co-servant of respondent when he performed the service of conducting the business and directing the employees in carrying it on. In that service he was acting as the agent of his master, and performed the duties of his principal. He therefore stood in the place of appellant as regards the acts complained of. Any omission on his part in performing the duty owing to respondent under the circumstances is chargeable to the principal.

The evidence tends to show that Germershausen had been informed before the accident that the horse was vicious and had kicked at persons in appellant's service who harnessed and used him. Since Germershausen was appellant's agent in directing respondent to use the horse for the purpose indicated, his knowledge must be deemed the knowledge of the principal. Appellant could discharge its duty toward respondent by furnishing only safe and gentle horses to be used in its business. If a vicious and dangerous one was furnished, it must follow that the servant who is unfortunate enough to have the vicious and dangerous one assigned to him is dealt with as if no other horse were furnished and used in the master's business. The court properly awarded judgment on the verdict, on the grounds that the horse was vicious and had a propensity to kick at persons, that such propensity was known to Germershausen before the accident, and that he was not a co-employee of the respondent, but was a vice-principal as regards the transaction covered by the case. Upon this subject see the cases collected and cited in the opinions of *Dwyer v. Am. Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Okonski v. Pennsylvania & Ohio F. Co.* 114 Wis. 448, 90 N. W. 429. The judgment must stand, unless the court committed error in some of the other exceptions argued.

It is urged that it was an error to put the questions to impeaching witnesses in the form giving the particular lan-

guage the witness is stated to have used out of court, and adding the words "or words of like meaning," or "words of similar import." This form of interrogatory calls for the words of the statement made, or giving them in substance. In the case of *Gould v. Norfolk L. Co.* 9 Cush. 338, it was held that an objection to the inquiry because not calling for the precise words of the statement of the witnesses sought to be impeached should not prevail if the witness called to impeach can state that which substantially contradicts the witness upon the trial. It is argued that this practice should not be sustained, because it makes the witness judge whether the words used by the witness sought to be impeached were of like meaning or import. The right of the opposing party to cross-examine the witness, and ascertain what the precise words of the statement in fact were, gives him opportunity to protect his rights in this regard.

The remarks of counsel in commenting on the evidence to the jury, in the words, "I don't recollect that Ben Germershausen testified that he had no information that the horse would kick," though technically objectionable, and though they might well have been omitted by counsel, cannot be held to have prejudiced the appellant's case before the jury. Nor do we find prejudicial remarks in other portions of the argument excepted to.

Exceptions are preserved to the admission of testimony, over appellant's objections, tending to show that employees consulted Germershausen concerning their duties and the repair of instruments used by them in their service. We find no error in the ruling.

A large number of requests for instructions were submitted by appellant. The court gave some of these, and rejected others. We have examined those rejected and those given by the court, and find the instructions given by the court fully cover and embody the rules of law applicable to the case. The practice of the trial court in characterizing the instruc-

tions requested by one party or the other, though not ordinarily deemed to be grounds for reversible error, is not advisable, and the court should not make a distinction between instructions originating with the court and those presented by either counsel. See *Gutzman v. Clancy,* 114 Wis. 589, 90 N. W. 1081.

The verdict is assailed upon the ground that the damages were excessive. The evidence as to the nature and extent of the injuries sustained is to the effect that there is a total loss of one eye, and some impairment of the other; that bones of the face, forehead, and skull were injured, and left an unevenness of the surface. A part of the bone covering the brain had to be removed, leaving the brain without natural protection over this area. The injuries were very painful, and still cause pain and much discomfort. Upon these facts as to the nature and extent of the injury, we cannot say that the jury awarded an excessive amount as damages.

We find no error in the record upon which judgment should be reversed.

By the Court.—Judgment of the circuit court is affirmed.

LEMKE, Respondent, vs. DIETZ, imp., Appellant.

February 29—March 22, 1904.

Tradenames: Proprietary medicines: Imitations: Deception of public: Equitable relief.

Where the reputation of a proprietary medicine was partly due to the long experience and great care of a physician who manufactured it for many years, the use, after his death, by a subsequent manufacturer, of labels bearing such physician's name in a way to indicate that he was still living and, if not himself preparing the medicine, was at least superintending its manufacture, is *held* such a deception of the public that a court of equity will not lend its aid to protect the manufacturer from infringements or imitations of his tradenames or labels.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action in equity to enjoin the infringement of alleged trademarks and to prevent unfair competition in trade. The defendant *Dietz* demurred generally to the complaint, and appeals from an order overruling the demurrer.

The complaint states, in substance, that on and for many years before May 1, 1883, the defendant F. A. Sabine and one A. J. Lemke were partners in business under the name of the F. A. Sabine Medicine Company, and were manufacturing numerous medicinal compounds under formulæ owned by them, and were selling the same in many states in packages and bottles under the general name and trademark of the Sabine medicines, among which compounds were "Sabine's World's Relief" and "Sabine's World's Relief No. 2," together with thirteen other remedies, not necessary to be specifically named here, but each having a name in which the word "Sabine" or "Dr. Sabine" occupies the chief place (e. g., "Sabine's Blackberry Soothing Drops," "Dr. F. A. Sabine's Bone Liniment"); that the packages and bottles in which all these compounds have been and now are sold have always borne the said names and trademarks as their chief distinguishing mark, and long prior to May 1, 1883, had acquired a high reputation as valuable medicinal specifics, under the name of Sabine medicines, and the name "Sabine" had thus acquired a peculiar and distinctive value in connection with said medicines; that on May 1, 1883, in consideration of $4,000 paid by Lemke to Sabine, said Sabine sold, assigned, and set over to said Lemke all his right and interest in said business, and in said compounds and formulæ, trademarks, and names, and the right to use the same, and covenanted and agreed not to manufacture or sell the same, or any other compound bearing the name of the Sabine medicines, or to use said trademarks or names within the United States, or to use the name of Sabine in connection

with similar or like compounds, or to allow others so to do; that from and after May 1, 1883, said A. J. Lemke continued to manufacture and sell said medicines under said names and trademarks, and to carry on the business theretofore conducted by said partnership, until December, 1893, when said Lemke died at Milwaukee, and that, by virtue of probate proceedings duly had, the plaintiff thereafter became, by virtue of the will of said deceased and the assignment of the probate court, the lawful owner of said business and all its good will, rights, trademarks, and formulæ aforesaid, and the plaintiff has continued since the death of said A. J. Lemke to carry on said business, and now does carry on the same; that by reason of the long experience and the care of said A. J. Lemke and the plaintiff in the said business, and the good quality of the said compounds, the same have acquired a high reputation and extensive sale in the United States, and are a source of great profit, and are known to the public by the aforementioned tradenames, trademarks, and devices; that the defendant Sabine, after said sale to said Lemke and down to the present time, has wrongfully prepared and sold at Milwaukee and elsewhere imitations of plaintiff's said compounds put up in similar packages and bottles, with similar labels and trademarks; that the compounds called "World's Relief" and "World's Relief No. 2" are in the greatest demand of any of said medicines; that they have always been, and are now, sold in glass bottles, with wrappers and labels, of which copies are attached to the complaint.

(These wrappers contain on the front the words "Sabine's World's Relief," displayed upon the representation of a globe, under this device being the following legend: "Sabine's World's Relief No. 2. For pain in the stomach, cholera, cholera morbus, colic, cramps and diarrhœa. It is an instant cure for pain. Internal remedy. Price 25 cents. Dr. A. J. Lemke, Milwaukee, Wis." On one side of the pack-

age is the following legend: "Sabine's World's Relief No. 2. Observe the name, Dr. A. J. Lemke, without which none is genuine." Upon the other side is the following legend in the German language: "Sabine's World's Relief No. 2. Cures pain in the stomach, cholera morbus, cholera, colic, cramps and diarrhœa. Internal remedy. Price 25 cents. Dr. A. J. Lemke, Milwaukee, Wis." Smaller labels apparently placed upon the bottles contained directions in both German and English for the use of the medicine, with the following caution at the bottom: "None genuine unless the name Dr. A. J. Lemke is on the label. Dr. A. J. Lemke.")

The complaint further alleges that the defendant Sabine is offering for sale and selling in Milwaukee and elsewhere an imitation of the said World's Relief No. 2 in similar bottles, and inclosed in wrappers bearing similar labels to those used by the plaintiff, copies of which wrappers and labels are attached to the complaint (these last-mentioned wrappers and labels are close imitations, in style and type, of the plaintiff's wrappers and labels, and almost identical in verbiage, save that they omit the name "Lemke," and insert at the bottom the name "Dr. William A. Sabine Medicine Company, Buffalo, N. Y., and Milwaukee, Wis."); that said imitations are calculated to deceive purchasers, and actually have misled and still do mislead many to buy the same, believing that they are buying the genuine articles manufactured by the plaintiff, whereby the plaintiff's business and her profits have been greatly diminished; that the said imitations are of greatly inferior quality, and do not possess the medicinal qualities possessed by the plaintiff's articles; that by reason thereof the reputation of the plaintiff's articles and her business and profits have been greatly injured; that the defendant *Dietz* is the owner of a drug store in Milwaukee, and has associated himself with the defendant Sabine for the purpose of turning out, without license, imitations of the aforesaid medicines, with full knowl-

edge of the premises, and in wilful disregard of the plaintiff's rights; that the defendant Sabine has been financially poor, and that *Dietz* is financially well off, and has furnished Sabine with means to conduct the said business, and that since *Dietz's* connection with Sabine, and especially since the beginning of the year 1903, the defendants *Dietz* and Sabine have made such efforts and employed such means as will utterly and totally destroy the plaintiff's business, unless relief is granted; that by reason of the premises the plaintiff has been injured in the sum of $10,000; and that she has no adequate remedy at law. Judgment is demanded that the defendants be enjoined from selling or offering for sale any imitations of the plaintiff's compounds, or any compound bearing the aforementioned names or trademarks, or imitations thereof, or imitations of the plaintiff's labels; also that the defendants account for profits; and that the plaintiff have judgment for damages.

For the appellant there was a brief by *N. B. Neelen & F. W. Houghton,* and oral argument by *Mr. Houghton.*

Otto A. Lemke, for the respondent.

WINSLOW, J. We shall assume, for the purposes of this opinion, that the genuine "Sabine's World's Relief No. 2" possesses all the medicinal virtues attributed to it by the complaint and the labels; that it is an instant cure for pain, as the label assures us; and that upon its introduction, in appropriate doses, into the human system, pain in the stomach, cholera, cholera morbus, colic, cramps, and similar ailments flee away. Such a remedy is surely entitled to the name "World's Relief," though why it should be called "World's Relief No. 2" is difficult to understand. One feels a longing to know what greater feats of healing are accomplished by "World's Relief No. 1," when so inestimable a medical blessing is called "No. 2; " but upon this point the complaint

throws no light, and we seem destined to remain in ignorance, unless, indeed, we join those vast throngs which we are bound to believe are hurrying to the drug stores of the land to purchase the Sabine medicines, and, by the expenditure of a quarter of a dollar, learn what greater miracles in therapeutics are accomplished by the "World's Relief No. 1."

As said in the beginning, however, we assume that the medicinal compound which it is claimed has been imitated and counterfeited possesses substantially the merits claimed for it. Courts have sometimes refused to intervene on behalf of the owners of a proprietary medicine on the ground of the falsity of the claims made as to its healing quality, but this has always been after trial, when the falsity had been proven by sufficient evidence, and not upon demurrer.

The complaint, when fairly and reasonably construed, shows that the plaintiff is the owner of the right to manufacture the medicine and use the tradenames and labels in question, save, perhaps, for one feature hereafter noticed, and that those rights are valuable rights. We think it also appears from the complaint that both defendants have placed in the market imitations of said medicine, with wrappers and labels well calculated to deceive, and which in fact do deceive, the public, and have thereby injured the plaintiff's reputation and business. From these facts, irrespective entirely of the question of trademark, which we do not decide, we think it clear that a case of unfair competition in business by the imitation of packages and labels is alleged, except for one consideration, now to be stated.

The principle is settled that a substantial lack of truth in a trademark or trade-label debars it from protection at the hands of a court of equity. There may be no way of stopping the deception which the plaintiff is practicing on the public, but a court of equity will not lend its aid to give the plaintiff a monopoly in such deception. This is simply an applica-

tion of familiar principles, which are nowhere better stated, perhaps, than by Vice Chancellor SHADWELL in the old case of *Pidding v. How,* 8 Simons, 477, thus:

"It is a clear rule laid down by courts of equity not to extend their protection to persons whose case is not founded in truth."

This rule has been most frequently applied in cases where it has appeared by the evidence that the trademark or label contains false statements as to the qualities or ingredients of the merchandise. Browne, Trademarks (2d ed.) § 71. The rule, however, is by no means confined to misrepresentations of this description. It extends as well to false statements as to the identity of the manufacturer. *Manhattan Medicine Co. v. Wood,* 108 U. S. 218, 2 Sup. Ct. 436; *Siegert v. Abbott,* 61 Md. 276; *Pidding v. How, supra; Joseph v. Macowsky,* 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53; *Alaska Packers' Asso. v. Alaska Imp. Co.* 60 Fed. 103. This last-named case is instructive on this point. It was a suit in equity for infringement of a trademark. The plaintiff was the assignee of the Aleutian Islands Fishing & Mining Company, which had established a station for canning salmon on the island of Kodiak, Alaska. The complaint alleged that this last-named company had used only the best quality of salmon, and exercised great care and skill in packing, so that it acquired a very high reputation, and built up a very large business, and used a certain described trademark or brand upon its cans by which said salmon were known, and that said company leased its properties to the plaintiff, and assigned to the plaintiff the good will of the business, its labels, brands, and trademarks, and that the defendant was imitating the said trademark or brand. The label contained the statement that the salmon was packed "by the Aleutian Islands Fishing & Mining Co.," which was entirely false, and for this reason it was held that the plaintiff was not entitled to relief in equity. In that case it was admitted by plaintiff's counsel,

and we think advisedly, that in a case where the reputation and value of an article is due to some peculiar, personal, individual skill or genius of the original manufacturer, an assignee of the business should state the fact that he is the assignee in his labels, and cannot rightfully represent to the public that the article is still made by the original manufacturer; but he claimed that the principle did not apply to an ordinary article of manufacture, such as canned salmon. The court, however, held that the principle did apply to the case, because the complaint alleged that the care, skill, and expertness of the original manufacturer had given the salmon its high reputation. *A fortiori* should the rule apply to a medicinal compound like the World's Relief No. 2. It claims for itself great virtues. Naturally, the citizen afflicted with cholera or doubled up with colic will ask, as he inspects the bottle on the druggist's counter: "Who makes it? What assurance have I that it will do what the label says?" And turning to the label, he will find there the name of Dr. A. J. Lemke, Milwaukee, Wis. True, the label does not say categorically that Dr. A. J. Lemke manufactures it, but that is the natural and almost inevitable inference to be drawn from the various labels. This information is quite reassuring to the sufferer. We all know how we trust the physician's word in sickness, and, when we find a patent medicine which purports to be prepared by a physician, the inclination to regard it as necessarily superior to a preparation put forth by a layman is well known. The fact is, in a certain degree, a guaranty that the medicine has some merit. In the present case the complaint alleges that the long experience and great care of Albert J. Lemke had contributed to the reputation of the medicine, but that Albert J. Lemke died in December, 1893, since which time the plaintiff, as his legatee, has carried on the busines and made the medicine, and has sent it forth on its healing and soothing mission with the false assurance on every bottle that Albert J. Lemke was still

living at Milwaukee and was actively superintending the manufacture, if not preparing it in person. We can but regard this as a substantial false statement of a very material fact. If it was desired to assure the public that this was the same medicine prepared by Dr. A. J. Lemke, and after his formula, those facts could have been easily stated, and there would have been no deception. Our statute recognizes that proprietary medicines should only be prepared by a physician or registered pharmacist, by permitting their sale in sealed packages on which are printed the name of the contents, the directions for using, and *the name of the physician or pharmacist* by whom prepared, and apparently does not permit the general sale of any proprietary medicines compounded within this state which do not comply with these requirements. Sec. 1409*g*, Stats. 1898.

For the reasons stated, the demurrer to the complaint should have been sustained.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer.

THE STATE EX REL. JONES, Appellant, vs. CHAMBER OF COMMERCE OF THE CITY OF MILWAUKEE and others, Respondents.

February 29—March 22, 1904.

Contracts: Delivery upon condition precedent: Parol evidence: Sale of membership in chamber of commerce.

Parol evidence is admissible to show that a writing signed and delivered was not to become binding as a contract until the happening of some event or the ascertainment of some fact. Thus, it may be shown by parol that the transfer, by indorsement and delivery, of a certificate of membership in a chamber of commerce was not to take effect in case an agent of the vendor had already disposed of the membership.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Mandamus action to compel the defendant *Chamber of Commerce* to cause a notice of the transfer of a certificate of membership in the corporation from William F. Host to the relator, to be posted on the bulletin board in the exchange rooms of such chamber, and to transfer such membership to him upon the books of the corporation and issue to him a proper certificate evidencing his status in respect to the corporation, and to recognize him as a member thereof in good standing. Issue was joined by a return to the alternative writ of *mandamus* and a traverse thereof, which was tried by the court, these facts being elucidated from the evidence:

March 14, 1901, George H. Salentine owned a certificate of membership in the defendant corporation, which, on that day, he sold to B. H. Dally. Such proceedings were thereafter taken that such membership was duly transferred to Dally on the books of the corporation. Prior to February 1, 1901, William F. Host owned a certificate of membership in such corporation, which membership on that day he verbally authorized William J. Langson to sell. March 21, 1901, Langson executed his said power by selling such membership to John Geddes. Thereafter such proceedings were duly taken that the membership represented by such certificate was duly transferred upon the books of the corporation to said Geddes. March 21, 1901, before the sale aforesaid, George H. Salentine applied to Host to purchase his said membership certificate and was informed of Langson's authority and that he could have the certificate for $75 if Langson had not disposed of the membership. That was agreed to. Host thereupon indorsed the certificate in blank and delivered it to Salentine, stipulating that if it should turn out that Langson's authority had theretofore been executed, the paper should be returned. Salentine gave Host a note for $75, which was to be in payment for the certificate.

Host learned later of the sale by Langson to Geddes, and thereupon demanded back the certificate, at the same time tendering the $75 note. Salentine refused to accept the latter or give back the former. August 15, 1901, the relator was duly elected to be a member of the defendant corporation, subject to compliance by him with the subsequent conditions requisite thereto. September 5, 1901, he presented to the secretary of the corporation the Host certificate endorsed as aforesaid, and demanded that a notice of the transfer from Host to the relator should be posted as required by the laws of the corporation, at the same time tendering the certificate of membership and member's admission ticket for cancellation, and offering to pay the regular fee of $25. The demand and offer were refused.

On those facts the trial court found that no title to the Host certificate passed from him to Salentine or from Salentine to the relator, and that the defendants were entitled to have the petition for the writ of *mandamus* and the writ dismissed with costs. Judgment was so rendered.

Adolph Huebschmann, for the appellant.

For the respondents there was a brief by *Miller, Noyes & Miller,* and oral argument by *George H. Noyes.*

MARSHALL, J. It is considered that the findings of the trial court, properly understood, are supported by the evidence. True, it does not appear that Langson had, prior to the transaction between Host and Salentine, actually sold the certificate, but he had parted with the membership which it represented to the extent of fully executing the power delegated to him. He had contracted it to Geddes as he was authorized to do, so that the latter was in a position to call upon Host with effect to perform by turning over the paper. That is, he had, as counsel for respondents suggest, done just what was understood between Host and Salentine would, if it occurred, render the delivery of the certificate to the latter

ineffectual. The minds of Salentine and Host met on the proposition that if it should turn out that Langson, prior to the delivery of the certificate to Salentine, had executed his authority, then Salentine was to be deemed to be a mere holder of the paper for Host. It was a plain case on the findings and the evidence of the manual tradition of a paper having the form of a contract, but which was not intended to have that effect till the happening of some condition precedent resting in parol.

The rule applicable to the facts as above stated is well established (*Nutting v. Minnesota F. Ins. Co.* 98 Wis. 26, 73 N. W. 432), as is also the rule that it is not to be applied except in cases falling clearly within its principles (*Thorne v. Ætna Ins. Co.* 102 Wis. 593, 596, 78 N. W. 920). The idea is this: A paper having the form of a contract may be delivered to take effect upon condition precedent. In that case there is no contract in fact till the contingency happens stipulated by the parties. As there is no contract in advance of such event, proof of the parol agreement in that regard is not an attempt to vary a written contract. That doctrine cannot be extended to include the delivery of a contract to take effect thereby, but to be terminated upon the happening of a condition subsequent. In such circumstances contractual relations commence by the delivery of the paper, so proof of a contemporaneous parol agreement that it shall cease upon the happening of some stipulated event would be plainly an attempt to vary a written contract by parol. An instructive discussion of this is found in *Ware v. Allen,* 128 U. S. 590, 9 Sup. Ct. 174, where as in this case there was an exchange of papers, one party delivering to the other a contract, in form, and receiving back certain promissory notes in consideration thereof, it being agreed at the time that whether the transaction should constitute a contract or not should depend upon the legal opinion of one or the other of two attorneys mentioned as to its validity. The opinion was

adverse, and it was held that the paper never took effect, hence that parol evidence in regard to the circumstances of its delivery was not an attempt to vary a written contract, the court saying, in effect, quoting with approval from *Pym v. Campbell,* 6 El. & Bl. 370, 373: Evidence to show that a written agreement was conditional is to be distinguished from evidence to show that there never was any written agreement. A paper being signed and delivered, coupled with an understanding that it shall not be an agreement till the happening of some particular event, the party receiving it cannot fix the same upon the other as an agreement till the happening of such event. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible; but evidence to show that there is no agreement at all is admissible.

This court, in *Thorne v. Ætna Ins. Co., supra,* suggested pointedly the importance of not mistaking a writing delivered as a contract, to be extinguished upon the happening of a condition subsequent, which is without the rule here applied, for a writing delivered to take effect upon condition precedent, which is within the rule, in the following language:

"The rule should be cautiously applied and the facts clearly proven. . . . It is to be observed that the rule is that it may be shown that the contract is not to become binding until the happening of some event or ascertainment of some fact, but not that the contract is to be presently binding and to become void on the happening of some event. If a contract is executed and delivered with intent to take effect, it is not to be thereafter avoided by virtue of a condition annexed to the paper by parol."

Here the court, upon sufficient evidence, found that a paper delivered to Salentine was to take effect upon condition precedent, and if it should appear that it could not take effect, then it should be returned. It follows that Salentine never became the owner of the Host certificate. He there-

fore was never in a position to convey any title thereto to the relator, nor the latter to obtain any standing as regards the respondent by the possession thereof and tender of the same to its secretary, or any other proceedings taken by him in respect thereto.

The foregoing renders unnecessary the discussion of any other question presented for consideration in the briefs of counsel for appellant. The title to the certificate falling, the whole groundwork of his cause of action disappears.

By the Court.—The judgment is affirmed.

AUER, Respondent, vs. BROWN, Appellant.

February 29—March 22, 1904.

Powers: Life estate, when changed to fee: Execution of power: Statute construed.

A testator devised land to his wife for her life and gave her also an absolute power of disposition thereof, unaccompanied by any trust. Any part thereof which might remain at her death he gave to his children. The widow sold a portion of the land and gave a warranty deed thereof, which was intended by her to convey the fee, but which made no specific reference to the will or the power of sale therein contained. *Held*, that the grantee was a purchaser within the meaning of sec. 2108, Stats. 1898; that in respect to his rights the estate of the widow was a fee by virtue of that section; and that the sale and conveyance by her was such an execution of the power as that section contemplates.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

One Samuel Brown, dying in 1874, devised all his property to his wife, Clarissa,

"for her life, without impeachment for waste, and without being in any way liable to account to any person or per-

sons for said property or its use or the proceeds thereof. And I do also devise and give to my said wife full power and authority to grant, bargain, sell, transfer, exchange, barter, mortgage or convey any or all of the said estate in fee simple and absolutely if she shall desire or choose so to do; also to convert any of said real estate into personal property, or any of said personal property into real estate, and so long as she lives she shall have and I do hereby give to her the full power and right to use all or any of said estate as she may desire even if in so doing she shall use and exhaust the whole. She may not only use the same as she may need, but she may during her life and subject only to her own discretion (in which I have all confidence), donate the same or its proceeds, or any part or portion thereof, to any person, persons or objects of her choice exactly the same as if and to the same extent as if she was the absolute owner in fee or absolutely."

He disposed of any property that might remain at his wife's death, first, by a money legacy, and then all the residue in equal shares to his children, naming them, and their heirs, and to the issue of any child who should not survive him the share of the parents of such heir. He then added:

"*Fifth.* It is the true intent and meaning of the devise and bequest herein to my wife to give to her not only a technical life estate in said property, but also the right to exhaust the whole thereof if she choose so to do, trusting to her discretion, and to that end I do herein authorize and empower her to sell and convey absolutely in fee simple any or all of said property which I may die seized or possessed of and to mortgage, transfer, or exchange the same as hereinbefore specified in subdivision two of this will, she being responsible to no one for any action she may take in the premises."

In 1884 said Clarissa sold certain specified real estate to the plaintiff jointly with one Miller and one Holtz, and delivered to them a warranty deed purporting and warranting conveyance to be in fee simple, the price paid, $18,350, being a reasonable and fair price for the fee of the premises; such deed, however, making no specific reference to the will of

Samuel Brown nor to the power of sale therein contained. The interests of Miller and Holtz were subsequently conveyed to the plaintiff, who sold parts of it, but retained that described in the complaint. The court finds that said deed was intended by Clarissa Brown to convey the fee of the premises described therein.

Clarissa Brown died in 1887, and the appellant, *Clara M. Brown,* who is a granddaughter of Samuel Brown, made claim to a proportionate undivided share in this land. This action was brought, first, to reform the deed from Clarissa Brown to the plaintiff and his associates; and, second, to quiet his title thereto as against the adverse claim of the defendant. The court refused the prayer for reformation of the deed on the ground of the ten years' statute of limitations, which was pleaded, but rendered judgment quieting plaintiff's title and barring the defendant; also dismissing a counterclaim in ejectment interposed by the defendant. From such judgment she appeals.

Howard Van Wyck, attorney, and *Charles Quarles,* of counsel, for the appellant.

For the respondent there was a brief by *Ryan, Ogden & Bottum,* and oral argument by *L. M. Ogden.*

Dodge, J. The court below, as appears from an opinion filed, rested its decision in favor of plaintiff's title in fee upon sec. 2108, Stats. 1898:

"When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts."

That the power of disposition conferred upon Clarissa Brown was an absolute one cannot be doubted under the

definition of that term in sec. 2112, Stats. 1898, as one "by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit." Nor can it be doubted that it is unaccompanied by any trust. Language can hardly be conceived stronger or clearer than that contained in the will to make plain the intent that the power conferred should be unhampered and unaffected in its execution by interest in favor of any person other than its donee. Sec. 2107, Stats. 1898. Also clearly the donee of that power is the owner of a particular estate for life, by all rules of construction and of the common law, since there is a limitation over of a remainder. 4 Kent, Comm. 535. Further, the plaintiff is unquestionably a purchaser, within the meaning of the statute. The extrinsic evidence, if admissible, and in any event the warranty deed itself, declaring a conveyance in fee, establish that the parties thereto intended a sale and purchase of the land itself, and not of any mere limited interest therein. Hence obviously the trial court was correct in holding that the situation fell squarely within the calls of this statute.

Sec. 2108 is therefore presented for construction. The respondent claims, and the court below held, that in respect to his rights Clarissa Brown held a fee in that land, according to the express declaration of the affirmative portion of the section. On the other hand, appellant contends that, even as against purchasers, the remainder is preserved by the last two lines of the section, unless the power be technically executed by a conveyance making express reference thereto or otherwise satisfying general rules of law. As to the necessity of such reference in order to constitute a conveyance, obviously intended to be in fee, a full execution of the power, we shall not deem necessary to express an opinion, though it has been the subject of much discussion in the books. Sugden, Powers, ch. 6, sec. 8; *Bradish v. Gibbs,* 3 Johns. Ch. 523, 551; *White v. Hicks,* 33 N. Y. 383; *Mut.*

L. Ins. Co. v. Shipman, 119 N. Y. 324, 24 N. E. 177; *Owen v. Ellis,* 64 Mo. 77; *Blagge v. Miles,* 1 Story, 426, Fed. Cas. No. 1,479; *Warner v. Connecticut M. L. Ins. Co.* 109 U. S. 357, 3 Sup. Ct. 221; *Lee v. Simpson,* 134 U. S. 572, 590, 10 Sup. Ct. 631; *Towle v. Ewing,* 23 Wis. 336; *Lardner v. Williams,* 98 Wis. 514, 74 N. W. 346. Confining ourselves, then, to the construction of sec. 2108, that section was adopted in Wisconsin as an integral part of the comprehensive scheme for a legislative regulation of powers enacted in New York in 1829, and borrowed by us in 1849. Ch. 58, R. S. 1849. The builders of that scheme reported to the legislature in their notes in the following words:

"It is an affront to common sense to say that a man has no property in that which he may sell when he chooses and dispose of the proceeds at his pleasure. We apprehend the legislature will have no difficulty in declaring that, so far as creditors and purchasers are concerned, the power of disposition shall be deemed equivalent to the actual ownership."

With that report they recommended, and the legislature enacted, the section above quoted, with two succeeding sections covering other aspects of absolute power of disposal of property. Secs. 2109, 2110, Stats. 1898. In deference to such history, the court of appeals of New York, per FOLGER, J., said:

"By sections 81, 82, 83, 84, 85, 86 [1 R. S. of N. Y. 1829, pp. 732, 733, pt. 2, ch. 1, tit. 2], an absolute power of disposition, unaccompanied by a trust, given to the owner of a particular estate for life or years, or to one to whom no particular estate is limited, or where no remainder is limited on the estate of the grantee of the power, or where there is a general and beneficial power to a tenant for life or for years, to devise the inheritance, by which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit, is construed to change that power into a fee, absolute in respect to the rights of creditors and purchasers, with reservatory provisions as to future estates limited thereon." *Cutting v. Cutting,* 86 N. Y. 522, 536.

This general view is supported in New York by *Crooke v. Kings Co.* 97 N. Y. 422; *Hume v. Randall,* 141 N. Y. 499, 36 N. E. 402; *Deegan v. Wade,* 144 N. Y. 573, 39 N. E. 692; and *In re Moehring,* 154 N. Y. 423, 48 N. E. 818. Most of these cases are assailed as being sustainable without going so far as the court did in the several opinions, but *Deegan v. Wade* is on all fours with the present case. There was an absolute beneficial power to devise by will vested in life tenant, but it was held a grantee by warranty deed took the fee by virtue of the statute, same as our sec. 2108, and that remaindermen had no rights, although there was no technical execution of the power, for the reason that the donee of the power had a fee by force of the statute, so far as rights of a purchaser were involved, and his deed conveyed it. The same view has apparently been taken by the supreme court of Alabama, where also the New York statute was adopted. *Alford's Adm'r v. Alford's Adm'r,* 56 Ala. 350. The only case in Wisconsin expressly referring to this statute is *Larsen v. Johnson,* 78 Wis. 300, 47 N. W. 615. There realty was left to widow for life, with power to dispose if necessary for her support, remainder over. She sold by warranty deed. Her grantee's title was sustained against remaindermen, apparently on two grounds: First, that the warranty deed must be deemed an execution of the power, on authority of *Bishop v. Remple,* 11 Ohio St. 277; but also apparently because she had a fee upon the happening of the contingency of necessity for support, both on general legal principles and by virtue of sec. 2108. We cannot but view this case as sustaining the construction of statute declared in *Deegan v. Wade, supra.* It perhaps goes further in some of its suggestions, though not in the case actually decided, for the rights sustained were only those of a purchaser, and not those of the original devisee in absence of a sale. In that case, too, there was exactly the same, and no more, direct execution of the power as in the one now before us, to wit,

a mere warranty deed with no reference to the power. Appellant has been able to cite, as in conflict with this construction of the statute, only *Mut. L. Ins. Co. v. Shipman,* 119 N. Y. 324, 24 N. E. 177; *Towle v. Ewing,* 23 Wis. 336; and *Lardner v. Williams,* 98 Wis. 514, 74 N. W. 346. Their utmost significance is that in them the remainders were held not cut off by the conveyances involved—mortgages in two of the cases and a quitclaim deed in the other. The statute was in no wise considered in any of them. The first and last have no application whatever, if for no other reason because the powers considered were in trust and not absolute. In *Towle v. Ewing* a mere quitclaim deed was made by a life tenant having power of disposal. It was held to have no effect except upon the life estate, because the intent of the parties inferable from the instrument was to buy and sell nothing else; such inference from a mere quitclaim deed in distinction from one on its face purporting to convey a fee being justified by authorities there cited and others. *Griswold v. Bigelow,* 6 Conn. 258; *Yates v. Clark,* 56 Miss. 212; *Baird v. Boucher,* 60 Miss. 326; *Bishop v. Remple,* 11 Ohio St. 277; *Owen v. Ellis,* 64 Mo. 77. The conclusion reached eliminated the case from the statute, for the grantee was thereby not a "purchaser" of the land itself or of that over which the power existed, in the sense of the statute. He had purchased merely the life estate therein.

In the light of the decisions above referred to, we cannot avoid the conviction that the construction of sec. 2108 adopted by the trial court is sustained by authority both in New York and Wisconsin. Were the question *res integra,* however, we do not see how we could disagree with the result. We must assume that the statute was enacted for some purpose. If, as appellant contends, there must be a technical execution of the trust, such as would be effective without the statute, then it is of no force, for certainly in the event of such execution the deed would convey a fee without aid from

any statute, and as to the grantee the conjoint life estate and power in his grantor would be in all practical aspects the equivalent of a fee. The difficulty urged by appellant is that the statute makes the *execution of the power* a condition upon which only, but for creditors, can the remainders be cut off. That expression must, however, be read in connection with the whole context of the section. When so read, it seems to be but another mode of expressing the same conception of a situation which is expressed by the word "purchaser" earlier in the section. In other words, whenever there is a purchaser there is an execution of the power, and either phrase adequately expresses the same idea. Further difficulty is suggested in giving to the words, "shall be changed into a fee," in sec. 2108, the same meaning as would be applicable to the words, "shall take a fee," in sec. 2109, declaring the interest of the donee of a power to whom no special estate is limited. It does not seem to us serious. Sec. 2108 was framed to include the situation of the donation of a power to one who already held an estate for life or years, who therefore could not be said to "take" a fee by the mere donation of the power. The phrasing was well adapted to express the declaration that upon such donation he should have a fee, so far as rights of creditors or purchasers might be involved. We conclude that the respondent is a purchaser within the terminology of sec. 2108, and that as to his rights the estate of Clarissa Brown was a fee by virtue of that section, so that her deed conveyed a fee to him, also that no rights remain in the appellant by virtue of that statute, because the sale and conveyance by Clarissa was such an execution of the power as sec. 2108 contemplates.

By the Court.—Judgment affirmed.

HOGAN, by guardian *ad litem*, Appellant, vs. WINNEBAGO TRACTION COMPANY, Respondent.

February 29—March 22, 1904.

Street railways: Injury to person in carriage: Contributory negligence of driver.

At about the time the driver of a single horse attached to a buggy turned upon the street railway track in order to cross to the other side of the street, a train came in sight, approaching around the corner at the rate of seven miles an hour. The horse was walking and was gentle and under control. The cars could have been seen when at a distance of ninety-five feet, measuring around the curve of the track. Upon seeing them the driver attempted to back off the track, and at the same time the motorman put on the brakes. The train stopped as the forward car touched the buggy, not injuring it but tipping it slightly, and one of the occupants of the buggy jumped out and was injured. During the time the cars ran the ninety-five feet the horse could have walked at least forty feet and have been beyond all danger. *Held*, that the driver was guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries sustained by the plaintiff by reason of a collision between the defendant's street car and a carriage in which she was riding. It is alleged that the defendant's employees were negligent in driving the car at a high rate of speed exceeding the rate fixed by the city ordinance, and in failing to ring the bell or give any warning.

It appeared by the evidence that the defendant operates an electric street railway in the city of Oshkosh; that one of its lines runs south on South Main street, and turns west to Ninth street at a right angle; that on the northwest corner of said intersecting streets there is a two-story brick store; that the city ordinance of the city of Oshkosh prohibits a greater speed than five miles an hour around curves;

that at about 8 o'clock p. m., Sunday evening, August 17, 1902, the plaintiff, a young girl, was taking a ride through the streets of Oshkosh in a single buggy with her sister and one R. J. Cole, the buggy being drawn by one horse and Mr. Cole being the driver; that they were driving east on Ninth street toward Main street, the horse walking and being upon the left side of the street railway track; that as they were still about thirty feet west of the west line of Main street Cole turned the horse onto the track in order to cross onto the right side of the street, and that at about the same time a train of three cars came into sight on Main street from behind the building, having a brightly lighted headlight; that the leading car was at a distance from the buggy of about seventy-six feet in a direct line and ninety-five feet around the curve of the track; that Cole endeavored to back his horse off from the track, and the motorman put on the brakes to stop the car. The driver, Cole, testifies as follows:

"The top of the buggy was half down. It was a nice, quiet, pleasant summer evening. From where we started to cross the track you can just see around the curve. You can't see very far on account of that brick building. I should judge the car was within about 100 feet of me when I see it, and as soon as I saw it I attempted to back off the track. The horse was not unruly. The train made no noise that I heard. We were not making much noise in the buggy, nor was the buggy or horse making much noise. My hearing is not defective, and my eyesight is not defective. I was looking east toward South Main street at the time I started to cross the track. The train came to a full stop at about the front wheel of the buggy."

It appears further from the testimony that the forward car struck the horse slightly, without inflicting any serious injury, and touched the buggy sufficiently so that it tipped to one side, and plaintiff jumped out of the buggy, breaking her leg and suffering other injuries. The buggy was not injured.

The jury returned the following special verdict:

"(1) Was the plaintiff injured at the time and place alleged? *Answer by the court.* Yes. (2) At what rate of speed were the cars running in turning the corner from South Main street onto Ninth street at the time alleged? *A.* Seven miles per hour. (3) Was the bell or gong sounded before turning the corner from South Main street onto Ninth street? *A.* No. (4) Was the headlight and the lights on the car burning when the train went into Ninth street? *Answered by the court.* Yes. (5) Ought the motorman, in the exercise of ordinary care, to have seen the plaintiff in time to have avoided coming in contact with the buggy? *A.* Yes. (6) Did the motorman try to stop the train as soon as it was apparent that there might be a collision? *A.* Yes. (7) Ought the person driving the horse, in the exercise of ordinary care and prudence, to have seen or heard the cars in time to have avoided coming in contact with them? *A.* No. (8) Did the employees of the defendant exercise ordinary care and prudence in the operation of its train at the time of the accident? *A.* No. (9) If you answer the last question 'No,' then was such want of ordinary care and prudence the proximate cause of plaintiff's injury? *A.* Yes. (10) Was the plaintiff guilty of any want of ordinary care which contributed to her injuries? *A.* No. (11) Was the person driving the horse guilty of any want of ordinary care which contributed to the plaintiff's injuries? *A.* No. (12) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess her damages? *A.* $1,500."

The court, upon motion, struck out the answers to questions No. 3, 7, 10, and 11 as being contrary to the evidence, and thereupon entered judgment upon the verdict for the defendant, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Phillips & Hicks,* and for the respondent on that of *Weed & Hollister.*

WINSLOW, J. We think the trial court was right in setting aside the findings of the jury to the seventh, tenth, and

eleventh questions, and in entering judgment for the defendant. It seems to us beyond question that the admitted facts show that the driver of the horse was guilty of contributory negligence. The place where the driver turned his horse upon the track was not in dispute. It was at a point about thirty or thirty-five feet west of the line of Main street. At this point the cars coming down Main street could certainly be seen when at a distance of ninety-five feet measuring around the curve of the track. The horse was gentle and under control. The train was going (as found by the jury) at the rate of seven miles per hour. The horse was walking. The train stopped as it touched the buggy, without injuring it. All these facts are verities in the case. Now, when Cole drove upon the track the train was either in sight or it was not in sight. If in sight, he either drove on without looking, which was negligence, or he looked, and then drove on with knowledge of the approach of the train, and thus assumed the risk. If the train was not in sight when he drove on the track, then it is a demonstration that he must have allowed his horse to stand upon the track and wait for the train to run him down. The train was going at the rate of seven miles an hour. It traveled more than ninety-five feet under the last supposition, and its speed was constantly diminishing till it came to a standstill, and during all this time the horse was allowed by his driver to stand on or near the track. During the time that the train was proceeding ninety-five feet, granting that a horse walks no more than three miles an hour, the horse could have walked at least forty feet, and could easily have been beyond all danger. The physical facts which are verities in the case and incapable of being explained away demonstrate the contributory negligence of the driver beyond dispute. In this view of the case no other question need be considered.

By the Court.—Judgment affirmed.

HARRIGAN and others, Respondents, vs. GILCHRIST and others, Appellants. [Eight appeals.]

December 11, 1903—June 10, 1904.

APPEAL. (1, 2) *Service of notice: "Adverse party:" Insolvent corporation.* (3, 4) *Several appeals in one notice: Undertakings.* (5, 7) *Security for costs: Validity of statutes: Constitutional law.* (6, 8) *Jurisdiction of appellate court: Defective appeal: Allowing omissions to be supplied.* (9, 10) *Denying motion to dismiss after defect cured: Terms.* (66) *Findings of fact, when disturbed: Evidence: Fraud.* (117) *Taxation of costs: Several appeals: Who are prevailing parties.*

JURISDICTION: EQUITY. (6) *Of appellate court: Defective appeal.* (11) *Of subject matter: When may be challenged.* (12, 14–16) *Want of power, or abuse thereof: Results.* (13) *Circuit courts: Constitutional jurisdiction: Extent.* (17) *Action, at law or in equity? Question not jurisdictional, but one of practice.* (18, 59) *Error, when jurisdictional.* (19–21, 57, 58) *Equity jurisdiction: Extent: Principles not precedents: Complicated subject matter.* (25) *Same: Enforcement of trusts.*

CONSTITUTIONAL LAW. (5, 7) *Statutes requiring security for costs: Validity.* (52, 53) *Trial by jury: Extent of right: Statutory actions.*

CORPORATIONS: INSOLVENCY: RECEIVERS: WINDING-UP ACTION: TRUSTS AND TRUSTEES. (22–24) *Property as trust fund for creditors: Parties defendant in winding-up action: Receiver as trustee: Constructive trustees of property obtained by fraud.* (25) *Exclusive jurisdiction of equity.* (26, 27) *Sequestration: Statutory remedy: Policy of courts.* (28) *Creditors' action not dependent on statute.* (29) *Relations between creditors and receiver: Respective spheres of action.* (30–33) *Destroying identity of subject of trust: Accounting by trustee: Liability at law or in equity? Tort.* (34–38) *Receivers, when and by whom compelled to account: Procedure: Contempt proceeding not exclusive: When not to be made defendants as trustees.* (39, 40) *Fraudulent transferee as defendant: Discovery.* (41) *Dissolution of corporation: Power of courts: Administering property.* (42–44) *Remedies of creditors as to trust fund: Legal title: Receiver not essential.* (45) *Code substitute for creditors' bill.* (46, 47) *Amended or supplemental complaint: New matters: Broadening the action: Parties.* (50) *Form of judgment.* (51) *Joint liability of constructive trustees.* (54, 55, 60) *Receiver collusively appointed, when treated as mere agent for co-wrong-*

doers: Parties defendant: Accounting. (56–59) *Pleading in winding-up suit: Matters included.* (61) *Condition precedent: Return of execution unsatisfied.* (62) *Parties: Rearrangement after suit commenced.* (63) *Supplemental complaint: Delay in asking leave to file.* (64, 65) *Consolidation of actions.* (67–69) *Receiver conserving equities at his own expense: Lien: Speculating with subject of trust.* (70, 71) *Judicial advice: Oral evidence: Misstatements to court.* (72, 112) *Relief granted although fraud not proven.* (66*b*) *Degree of proof necessary.* (73) *Survival of action: Accounting.* (74–78) *Conserving hypothecated assets, etc.: Rights of secured creditors: Sharing in distribution: Exhausting security.* (79–81) *Completing unfinished contracts: Directions by court.* (82, 83) *Imperfect mortgages: Intention to pledge: Equity: Priority.* (84–86) *Purchase of trust property by trustee voidable: Recovery of damages by* cestui que trust. (91, 99) *Advisory orders may be* ex parte. (92) *Creditor's expenses in prosecuting suit, when allowed.* (93, 94) *Interests of secured creditors when not adverse to receiver: Attorneys acting for both.* (95, 97, 98) *Attorneys for receivers: Allowances: Itemized accounts.* (96) *Allowance for receiver's services.* (100) *Receiver's responsibility for mistakes of judgment.* (101–103, 106) *Receiver's accounts: Time and manner of examination: Reference not governed by statute or rules: May be closed summarily: Ex parte settlement an indiscretion.* (113, 114) *Attorneys when bound by allowance: Reducing allowance: Recovery of excess paid: Interest.* (115, 116) *Expense of settling accounts: Allowance: Judgment for costs against creditors, when payable from trust fund.*

PLEADING AND PRACTICE. (5, 7) *Security for costs: Validity of requirement.* (48) *Scope of the Code.* (49, 56) *Misjoinder of causes of action: Waiver.* (50) *Judgment: Form.* (52, 53) *Trial by jury: Extent of right: Statutory actions.* (61) *Demurrer* ore tenus. (63) *Supplemental complaint: Delay in asking leave to file.* (64, 65) *Consolidation of actions.* (73) *Survival of actions.* (89) *Reliance on judge's announced opinion: Subsequent contrary decision: Re-opening case.* (104) *Recitals of fact in order presumed true.* (105) *Preparation of findings by attorneys.* (107, 108) *Judges: Reviewing decisions of predecessors: Setting aside orders improvidently granted.* (109, 110, 113, 114) *Recovery of moneys paid on orders afterwards set aside: Interest.* (111, 112) *Suit on one cause of action, recovery on another: Equity.*

EVIDENCE. (66*b*) *Fraud: Degree of proof necessary.* (87) *Statements of agent as against principal.* (90) *Undisputed testimony of interested party.*

MORTGAGES. (82, 83) *Imperfect attempt: Intention to pledge: Equity: Rights of other creditors: Priority.*

SALES. (88) *Of electric lighting plant: Contracts and supplies impliedly included.*

I.

A creditors' action was commenced as to an insolvent corporation, a receiver appointed, and the usual sequestration proceedings had. Subsequently, the complaint being deemed defective, a supplementary action was commenced, and like proceedings were had therein as before, the receiver's acts under the first appointment being affirmed. Thereafter all proceedings were had as in the two actions till after the passing of the receiver's final account and the distribution of the assets. Then, upon a showing made by creditors that such actions, though commenced ostensibly in their interests, were, in fact, commenced and carried on throughout pursuant to a conspiracy between the officers of the corporation and others to misappropriate the corporate assets, their agent being imposed upon the court as receiver and judicial approval of his acts obtained by fraud, and that it was desired to have the causes so combined and reorganized as to call upon the wrongdoers to account therein for their misdeeds,—no judgment having been rendered interfering with the proposed course,—a formal order was made consolidating the actions and vacating so far as necessary the administrative orders, particularly those passing the receiver's account and distributing the assets. The moving creditors and all similarly situated and wishing to join with them were made plaintiffs, and those theretofore in such position defendants, joining with them the alleged wrongdoers. The order permitted the filing of a supplemental complaint tendering such issues as might be deemed necessary to the administration of the trust. Such a complaint was filed and served and issues joined thereon by all defendants as to all the material allegations thereof, and a trial was had resulting in a judgment for plaintiffs, relief being granted according to the liabilities respectively adjudged against the defendants. Thereupon eight notices of appeal were served, each notice being by two or more defendants to the effect that the persons named therein "severally and separately" appealed, one undertaking for $250 being given with each notice. No notice of appeal was served upon the insolvent. The clerk of the trial court certified the record to this court, and for two years thereafter respondents' counsel treated the appeals as regular, stipulations being made with appellants' counsel providing for continuances, among other

things, with terms in some cases imposed upon appellants, which were submitted to. At the fourth term of the court after such filing of the record, and when the appeals were about to be heard upon the merits, respondents' counsel moved for a dismissal thereof because, while each appellant appealed separately from others, he did not give a separate undertaking. Appellants' counsel seasonably thereafter made due applications to the trial court under sec. 3052, Stats. 1898, for leave to perfect the appeals, which were granted and an undertaking filed accordingly for $250 as to each appellant. A supplemental return having been made showing such facts and bringing up such undertakings, and the motions to dismiss them having been heard,—*Held:*

1. The term "adverse party" in sec. 3049, Stats. 1898, relating to the service of notice of appeal to this court, does not mean merely the opposite party on the record. It does not extend beyond parties having some substantial interest in sustaining the decision challenged by the appeal. p. 207.
2. In an action to reach the property applicable to the payment of the indebtedness of an insolvent corporation, a judgment having been rendered against parties charged with wrongfully appropriating such property or some part thereof, it being conceded that the corporate indebtedness greatly exceeds the corporate assets, and the corporation having for all business purposes ceased to exist, though yet having a legal entity, it is not an adverse party within the meaning of the appeal statutes, in a controversy upon appeal between the creditors and the judgment debtors. p. 210.
3. If several parties join in one notice of appeal, stating that they severally and separately appeal, the effect is the same as if there were as many notices of appeal as appellants; and to make the notice effective as to any appellant an undertaking in the sum of $250 under the statute is requisite to each. p. 210.
4. An undertaking in form to answer in the sum of $250 for the defaults of several defendants constitutes one obligation. p. 211.
5. Reasonable regulations imposing costs and requiring security for costs as incidents of judicial proceedings to redress wrongs or protect rights, do not violate the bill of rights entitling every person to "obtain justice freely and without being obliged to purchase it." p. 214.
6. The giving in good faith of a proper notice of appeal, and the recognition thereof by the proper officer by returning the record to this court, confers jurisdiction here, to allow any defect in the appeal to be cured within the time limited by statute for

taking the same; and if the only defect is in failing to serve the statutory undertaking for $250, it being filed for the use of the respondent, it confers jurisdiction upon this court to hear the appeal without the error being cured, counsel for respondent not seasonably objecting. p. 212.

7. Statutory regulations of the right to a review upon appeal or otherwise, as regards costs and security for costs, cannot be condemned as class legislation merely because it is more burdensome for some persons than for others to comply therewith. p. 220.

8. If the omission to give a proper undertaking to perfect an appeal happens through mistake or accident, it is proper for the trial court to allow such omission to be cured; and if the omission is not attributable to either mistake or accident, so called, but is excusable in any view of the matter, it is competent for this court to allow the defect to be cured if application be seasonably made therefor. p. 221.

9. The new undertaking here being a full compliance with the statutory requirements as to each appeal, and having been filed before the motions to dismiss were heard, it is proper to deny such motions with or without costs to the moving parties, as justice requires. p. 222.

10. Respondents' counsel having treated the appeals as properly taken, with knowledge or full means of knowledge of the facts up to a time when a change of position on their part would be prejudicial to appellants, and having given no reason for not calling the court's attention to the defects at an earlier date, and such defects having been promptly cured as soon as called to the attention of appellants' counsel, no terms should be imposed as a condition of denying respondents' motions and allowing the appeals to stand, except that appellants be required to submit the same upon the merits when reached in their order. p. 222.

II.

The court, preliminary to deciding the appeals upon the merits, having caused a reargument upon this proposition:

"The property of an insolvent corporation having been placed under the control of a receiver appointed by the court in a winding-up suit, and it being claimed that such receiver, in the course of his administration, has wrongfully lost such property or some portion thereof, his attorneys and others participating in the wrong; is it competent for the court to make the alleged guilty parties defendants in the pending suit with some creditor, or creditors, standing for all persons so cir-

cumstanced, as plaintiff or plaintiffs, broaden out the complaint so as to cover the new matters by a supplemental bill, litigate the same, and include in the general decree in such suit recoveries against all of such alleged guilty parties according to the nature or extent of their liabilities?"

Held, in respect thereto as to points raised by counsel, and others suggested:

11. A challenge to the jurisdiction of the court of the subject matter of the litigation in any action is proper at any time in the progress thereof. Whether counsel raise the question or waive it, or expressly consent to the jurisdiction, does not change the situation. p. 224.
12. If the defect of jurisdiction springs from want of power the result is void; if from inexcusable departure from established principles governing the exercise of judicial power, it is erroneous and may and ought to be set aside upon appeal regardless of the attitude of counsel in respect thereto upon either side. pp. 227, 228.
13. The constitutional jurisdiction of the circuit courts of this state is substantially coextensive with that of the English courts of King's Bench, Common Pleas, and Chancery combined. p. 227.
14. A court may be without judicial power as to a particular subject matter, or have such power, but by settled principle ought not to exercise it at all or in the particular way. In either case, within the broad meaning of the term, the court is without jurisdiction of the subject matter. p. 227.
15. Want of judicial power as to a particular subject of action renders relief granted to the plaintiff open to challenge, directly or indirectly, as void. Abuse of power in the sense of inexcusable departure from established principles in the exercise of judicial authority, leaves the result binding upon the parties interested till set aside in some appropriate judicial proceeding. p. 228.
16. Judicial action beyond the limits of judicial power is usurpation. Judicial action within the limits of such power, but regardless of settled principles regulating the exercise of such power, is regarded as error of judgment, but may be jurisdictional error, nevertheless, though remediable only as before stated. p. 228.
17. Under the Code, whether a plaintiff plants his cause of action at law or in equity from the aspect of common-law procedure, does not, if improperly planted, raise a jurisdictional question in the strict sense of the term; only a question of practice. p. 231.
18. Whenever there is such a violation of established practice or principles in regard to the exercise of judicial authority as to

seriously interfere with the efficiency of judicial instrumentalities to administer justice, the error is jurisdictional. p. 231.

19. The jurisdiction of courts of equity is defined by principles, not by precedents; the former govern, the latter illustrate. p. 234.

20. New principles of equity are not to be added by judicial policy, but old ones are subject to development to meet new conditions. p. 235.

21. The relief within the power of equity jurisdiction to afford where legal remedies are inadequate or do not exist at all, is limited only by the wrongs to be redressed or the rights to be protected; this not extending, however, to mere violations of moral obligations. p. 235.

22. In an action to administer the property of an insolvent corporation and enforce liabilities germane thereto as a trust fund for the payment of its debts, all persons possessing any part of such fund in a trust capacity, in any legitimate sense, and all persons contingently liable or liable only upon principles of equity, for the benefit of creditors as a class, are proper defendants. pp. 237–240, 249.

23. A receiver of an insolvent corporation in a creditors' action to administer its affairs for their benefit, is a trustee of corporate assets in the right of the corporation for such creditors, and for the latter in their right as to all liabilities to which they may properly resort as a class, not enforcible by the corporation. p. 237.

24. The last foregoing rule includes persons who may have obtained property of the corporation in fraud of its creditors. They are constructive trustees for creditors, and their liabilities as such may properly be directly established in the creditors' suit. pp. 237–240.

25. The whole subject of enforcing trusts and administering the same is within the exclusive jurisdiction of equity in the absence of any statutory regulation on the subject. p. 241.

26. The statutory remedy by sequestration is not a right of action, new or old. It is at most a mere remedy of a provisional character, for use in an action which exists, except as regards mere form, independently of the statute, such remedy being merely in aid thereof. It is a substitute for the common-law writ of sequestration. p. 243.

27. Generally speaking, courts of equity will not, without legislative policy favorable thereto, manifested in some way, render a corporation incapable of performing its corporate duties and practically terminate its existence by sequestering its property and taking charge of its affairs, though it is within judicial power to do so if necessary to the ends of justice. p. 243.

28. The practice of administering the affairs of an insolvent corporation for the benefit of creditors by proceedings in a general creditors' suit, does not depend upon the statute. So far as the statutes go they are confirmatory or in aid of the law as it was formerly understood. pp. 244–246.
29. The fact that in a winding-up action creditors cannot act in the right of the receiver, does not militate against liabilities being enforced against parties as defendants in the creditors' action, the legal title to which is in the receiver. The creditors and the receiver have their respective spheres of action. That of the former appertains to the establishment of the trust to its fullest extent, and the enforcement thereof and of the liabilities created by law enforcible upon equitable principles so far as necessary to satisfy the claims of creditors, the effects in money to be covered into the trust fund in the possession of the receiver,—whose sphere of action is wholly administrative in character. pp. 247, 248.
30. A trust as to property having been established, the trustee cannot end his relations to the *cestui que trust* by destroying the identity of the subject of the trust. Such identity being lost, the trustee is yet liable to account in equity to the beneficiary for the loss. p. 251.
31. The doctrine, that when property once impressed with a trust entirely loses that character it cannot be followed and recovered *in specie*, has no application to the subject of whether a trustee may end his personal relations as such by a destruction of the trust fund. p. 250.
32. The doctrine that when the subject of a trust has been destroyed the liability of the trustee is at law, recognized; but the better and common doctrine *held* to be that the trustee is liable in a suit for an accounting as before indicated, and especially where his liability is incidental to a proper subject matter of an action in equity. p. 252.
33. A cause of action to compel an unfaithful trustee and those colluding with him in wasting a trust fund, to account therefor, is not one sounding in tort, though the facts may be such that an action for damages for the wrong might lie. p. 252.
34. The beneficiaries of a trust fund under the control of a receiver may, by permission of the court to whom the latter is accountable, maintain an action against him to compel him to perform his duty. p. 252.
35. A receiver is the agent of the court, and, as such, trustee for creditors, and is liable to account at such times and to such person, and in all respects in such manner, as the court, within the broad field of judicial discretion, may determine. pp. 253, 254.

36. While the usual method of compelling a receiver to account is by summary proceedings in the action in which he was appointed, and the usual way to enforce restitution by him of any sum he may be found upon accounting to have misappropriated or wasted, is by contempt proceedings,—the court, whose agent he is, is not limited to any particular method in that regard. It may adopt any procedure which is reasonable in any view thereof, under the circumstances of the particular case, including that of making the receiver a defendant in a creditors' action, like any wrongful holder of the trust fund or some part thereof, the action still being open so as to admit of that course, and may require issues to be formed by complaint and answer covering the subject, and the same to be tried in the usual way and closed as a part of the general judgment. pp. 253, 301.

37. *Boyd v. Mutual Fire Asso.* 116 Wis. 155, so far as it holds that in case a receiver trustee for creditors wastes the trust fund wrongfully by appropriating the same to his own use or otherwise the creditors have no cause of action which by permission of the court to whom the receiver is accountable they may enforce by action in equity, overruled. p. 262.

38. A receiver or other officer of the court is not a trustee and proper to be made defendant as such, within the meaning of that term as used in sec. 3237, Stats. 1898. p. 266.

39. *Clarke v. Banner & V. P. Co.* 50 Wis. 416, so far as it holds that a person to whom it is claimed property of an insolvent has been transferred in fraud of creditors can be made a defendant in an administrative suit as to such insolvent only for purposes of discovery,—*held* to have been overruled shortly after it was made and never to have been followed. p. 267.

40. Sec. 3228, Stats. 1898, which led to the decision before mentioned, provides a rule of evidence to the end that a party, guilty of participating in the commission of fraud upon creditors of insolvent corporations or fraud for which they may properly call him to account, may be a defendant in a winding-up action, and when called to testify as to his conduct, be incapable of shielding himself from making full disclosure by pleading the ordinary privilege of a witness as to self-incriminating matters. p. 267.

41. Authorities to the effect that a court has no inherent power to dissolve a corporation, have no application to the question of whether it has power to lay hold of and administer the property of an insolvent corporation for the benefit of creditors. The two matters are distinct. The statute provides a right of

action for the former, but only regulations and aids as regards the latter. p. 268.

42. The doctrine that no creditor can institute a proceeding to obtain any part of the trust fund in the hands of a receiver until it has been awarded him, does not signify that he has no right of action to enforce the trust so that an order of distribution may be made. p. 269.

43. The fact that the legal title to the trust fund in an administration suit is not in the creditors prosecuting the winding-up action, does not affect their right to an equitable remedy by action against the constructive trustee holders of the funds to be recovered and gathered into the hands of the agent of the court as their regular trustee. p. 269.

44. It is not an absolute essential to a creditors' action that there shall be a receiver. If only an accounting is sought and there is no need of a provisional remedy because there is no property to be previously conserved, no receiver need be appointed. In any event the creditors' action proceeds from the commencement under their control and the direction of the court, regardless of whether there is a receiver or not. p. 270.

45. A creditors' action is commenced by a complaint in the nature of a bill in equity. Such complaint is the substitute for, and in all respects performs the office of, the creditors' bill of the old practice. The Code system substitutes the civil action and its appropriate procedure for the former suit in equity or action at law. It only provides a new form of action, leaving the general characteristics of the remedy otherwise the same as before. It is the forms of action, not the substance thereof, as regards the essential of the remedy, that were abolished by the Code. p. 273.

46. New matters which, had they been known or had they existed at the commencement of an action, might properly have been incorporated in the complaint, may be brought in by amended or supplemental complaint. Such was the old practice, and it is preserved by sec. 2687 of the Code. p. 274.

47. It is proper in a winding-up action to commence the same in a simple form, according as the necessities of the particular situation may require, and thereafter, with or without leave of the court, according to circumstances, broaden the same out by amended or supplemental complaint so as to bring before the court all parties and all matters proper or necessary to be so circumstanced in order that the entire subject matter, using the term in its broad sense, may be fully dealt with. p. 274.

48. The doctrine that the Code furnishes a new and complete system of procedure as regards forms of action, and a substitute

as regards names and general characteristics for common-law pleadings, and a system of procedure as regards the same, does not mean that such system includes a form for pleadings and judgment, or for all mere details of practice. p. 277.

49. A misjoinder of causes of action is waived by the defendant if complaint be not seasonably made in the manner prescribed by statute. p. 278.

50. The statute furnishes no form, strictly so called, for a judgment in an action to administer the property of an insolvent corporation for the benefit of creditors, nor for any other. Sec. 3217, Stats. 1898, relates merely to a form of an order of distribution proper to be made in an action or special proceeding. The form of the judgment in all actions of an equitable nature, is governed by established principles of equity jurisprudence, and as indicated in sec. 2883, Stats. 1898. The judgment provided for in sec. 3245, Id., is for the closing up of an action to dissolve a corporation, not one merely to administer its assets for the benefit of creditors. p. 278.

51. Where several persons, in collusion with each other, misappropriate or so waste or misapply property as to become chargeable for the wrong as trustees thereof, they are jointly liable for the entire loss, regardless of the extent to which they may severally have been enriched. p. 280.

52. The constitutional guaranty of the right of trial by jury refers only to such right as it was enjoyed before the constitution. It did not extend then, so it does not now, to actions of an equitable nature. p. 281.

53. A statutory action is not necessarily to be tried by jury. Whether it is or is not so triable is to be determined, in the absence of a statutory declaration on the subject, with reference to whether its general characteristics are those of an action at law or one in equity from the aspect of the old remedies. p. 281.

54. If a receiver, appointed in an action in form to administer the property of an insolvent corporation for the benefit of its creditors, is imposed upon the court by keeping therefrom knowledge of the real purpose of those who nominate him, in the interest of the corporation or its officers, or both, he is to be deemed, as to creditors, the agent of their adversaries. pp. 284, 290, 302.

55. A receiver collusively appointed as above indicated, and enabled to use his office for the benefit of those who are in an adversary capacity to creditors, is not entitled to the usual protection afforded receivers; but may be dealt with, if the court so orders or permits, as a mere agent for such adversaries, and as such made a defendant in the main or an independent action, as

the court may order or permit, and his conduct judicially investigated in that way and his liabilities enforced by the instrumentalities afforded thereby. In that situation the receiver and his co-wrongdoers may properly be made defendants independently of the statutes, and under secs. 3237 and 3239 thereof as well. pp. 282–293.

56. All of a series of acts having in view the consummation of a single fraudulent purpose, regardless of the number of persons concerned therein, are parts of one subject matter; and where that is a primary subject of action or is an incidental part of a subject of controversy including it and other matters, however numerous, the entire subject matter may be brought into a single action for adjudication. pp. 288, 289.

57. The complications of an action to enforce all liabilities to which creditors of an insolvent corporation may, as a class, properly resort for the satisfaction of their claims, furnishes no justification for so limiting the character thereof as to eliminate therefrom any feature belonging thereto according to the broad principles that have been judicially determined to govern the subject. Those principles, not the difficulties in applying them, mark the boundaries of the subject matter that may be brought into an administration suit. pp. 295–300.

58. One of the most valuable features of equity jurisprudence is the opportunity thereby afforded to judicially lay hold of a subject matter, however large, and however complicated by numerous matters that might under some circumstances constitute each by itself a separate ground of action, bring in all parties directly interested or who should be before the court for their due protection, however numerous, and forever settle the entire controversy, with all its incidental disputes, its major and minor equities. p. 299.

59. Within the broad principles last above stated, no jurisdictional error can be committed so long as there is no unjustifiable prejudicial departure from established practice. pp. 300, 301.

60. If, pending an administration suit, before final judgment, even after the property has been distributed by order of the court, it is claimed upon reasonable ground that the receiver was, by a fraud, introduced into the action to aid the officers of the insolvent to carry out a preconceived design to defraud its creditors while pretending to act as the agent of the court,—it is permissible to make such receiver and his alleged guilty associates defendants in such suit as a method of requiring the receiver to account; and regarding him and his co-wrongdoers as standing for matters germane to the subject of the action, as may properly be done, such practice is fully approved. p. 302.

III.

61. In a creditors' action the rendition of a judgment at law, the issuance of an execution thereon, and the return thereof unsatisfied, should be alleged in the complaint, and a defect in that regard may be taken advantage of by demurrer *ore tenus*. p. 306.

62. In a creditors' suit, a sufficient cause of action having been stated in the complaint, a change of parties thereafter, so that no one under the rule last stated, competent at the start to invoke the jurisdiction of the court, appears as plaintiff, or a party to the action, the facts still appearing essential to the cause of action in the beginning, is immaterial. p. 307.

63. Mere delay in moving for leave to bring in a supplemental complaint does not preclude the court from granting a motion to that end. p. 308.

64. A consolidation of several equitable actions, that might have been brought as one, is proper under the statutes and independently thereof. pp. 308, 309.

65. A consolidation of actions means uniting several into one, not consolidation of trials. p. 309.

66. In considering whether findings of fact made by a trial court should be disturbed on appeal, these rules apply:

a. Such findings should stand unless so against the weight of evidence as to indicate, clearly, want of proper consideration of the evidence, mistake by overlooking material evidence, or prejudice, or some other improper cause.

b. It is incumbent on the party alleging fraud to establish it by clear and satisfactory evidence.

c. The first rule does not apply where the result is reached by the trial court through a misapprehension of the law.

d. The first rule applies with more or less significance according to the presence and importance of the elements upon which it is based.

e. The admission of improper evidence is to be deemed immaterial upon appeal unless it clearly appears that but for such evidence the finding would probably have been different.

f. Unless the contrary clearly appears, improper evidence taken under objection will be presumed to have been given no weight. pp. 312–314.

67. A receiver may properly, acting in good faith, at his own expense conserve an equity belonging to the trust if the court, with knowledge of the situation, decides that it were better such equity should be lost than to burden the trust fund to save it. p. 328.

68. A receiver, acting under the circumstances above indicated, may be deemed to have an equitable lien upon the property conserved for the amount of his reasonable expenditures, any profit obtained to inure to the trust fund. p. 328.
69. Under no circumstances can a receiver rightly speculate with the subject of his trust for his private gain. pp. 325, 326.
70. Oral evidence as to judicial advice in the administration of a receivership matter is not necessarily to be rejected or condemned as false. p. 329.
71. A misstatement of facts by fraud, negligence, or mistake, in a petition for judicial advice in a receivership matter, reasonably calculated to influence action to the prejudice of creditors and which has that effect, is a sufficient ground in the same jurisdiction to support an application by such creditors, seasonably made while the court there has control of the matter, for relief. pp. 337–339.
72. In an administrative action for the benefit of creditors, if a defendant is charged as trustee of property belonging to the trust fund on the ground of fraud, and the fraud falls yet the proof shows that such person has property which belongs to the trust, the appropriate relief in that regard may be granted. p. 339.
73. An injury to personal estate survives by statute, and where, if a person were living, an action in equity could be maintained against him for an accounting as to property in his possession, or its equivalent, a judicial remedy survives against his personal representatives. p. 340.
74. A receiver is not guilty of wrongdoing, necessarily, because he incurs expense in the collection or conservation of a liability validly hypothecated by the insolvent as security for a debt owing by him, because he has no reason to expect such hypothecation to yield a surplus for the trust fund. p. 343.
75. A creditor of an insolvent whose estate is in process of administration under judicial supervision, having a secured claim against such insolvent, may prove it to the full amount, and in such case he is entitled to share with general creditors upon that basis in every general distribution of trust funds till the dividends, together with the receipts, if any, from the security, are sufficient to fully pay such claim, the residue of the security remaining to belong to the trust fund or to the owner of the equity. p. 344.
76. The foregoing is the chancery rule. The rule limiting the claimant, in the circumstances stated, to share with general creditors only on the basis of his claim less the value of his security, unless he surrenders the latter, is wholly statutory and

generally confined to administrations under bankruptcy laws. pp. 344, 345.

77. The rule that where there are two funds, one person having security on both and another on one of them, equity will compel the former to first exhaust the security in which his interest is exclusive, is not to be applied to his prejudice. pp. 345, 346.

78. In view of the foregoing, a receiver may properly burden his trust fund, subject to the approval of the court, with expenses of converting into money choses in action or other property in which he has only an equitable title, creditors of the insolvent having the property as collateral, though no surplus is obtainable therefrom, if, under the circumstances, that seems for the best interests of general creditors. pp. 343–347.

79. A receiver may properly be allowed to finish uncompleted contracts of the insolvent, when that, at the time of action in regard thereto, seems for the best interests of general creditors. p. 352.

80. The court will not as of course order its receiver to complete unfinished contracts of the insolvent unless necessary to save investments already made, or otherwise save encumbered property, and such completion is clearly required in the interests of general creditors. In other cases the court and its receiver are to act according to their judgment of the probabilities as to general interests. p. 353.

81. A going manufacturing business,—with its manufacturer's stock, partly constructed machinery, and partly performed contracts, having large investments therein the safety of which depends on completing such contracts,—having been placed in the hands of a receiver to be wound up for the benefit, primarily, of creditors, many of such contract liabilities being validly hypothecated to creditors of the insolvent, and at the outset an order having been made for the temporary continuance of the business in aid of a conservation of the property for general creditors, with power to borrow money upon the credit of the trust fund therefor,—*held*, that such order, by implication, authorized the receiver to complete such contracts if in his judgment the interests of the trust fund would be best subserved thereby, obtaining special advice of the court in doubtful cases. pp. 352–354.

82. An imperfect attempt to give a mortgage, or any act clearly showing an intention to pledge property as security for an indebtedness, or "any transaction, whatever be its form or whatever name the parties may choose to give it," sufficient being done to enable a court of equity to deal with the matter, is in equity a mortgage; and, there being no superior equities,

is as forceful to hold the property for the interest of the mortgagee as any mortgage. pp. 359, 360.

83. A mortgage of the kind above indicated takes precedence of subsequently acquired rights of creditors in a judicial administration of property of the mortgagor for the benefit of his creditors, and forms a good consideration and justification for the giving of a formal mortgage when, if the equitable right did not exist, a valid security could not be given because of the rights of creditors. p. 362.

84. If a trustee, whether from good or bad motives, or whether the result be detrimental or beneficial to his *cestui que trust*, becomes a purchaser of the trust property, either directly or by concurrence with another as his agent or associate, the transaction is voidable at the election of such *cestui que trust* if he acts seasonably. p. 363.

85. In the circumstances last mentioned the *cestui que trust*, by his own act or by the court acting judicially to redress the wrong, cannot, surrendering the property to the wrongful holder, recover more than the damages sustained. p. 363.

86. Creditors having elected to surrender the property as above indicated, and by untenable claims and misapplication of the law obtained an erroneous judgment requiring much time and expense to obtain a correction of the error, rendering it likely that changes may probably have occurred in the meantime, and there being no real benefits recoverable, it is proper to regard their rights as foreclosed. p. 364.

87. The unsworn statements of an agent outside the scope of his agency are not proof of the matters indicated therein as regards his principal. pp. 365–374.

88. In the sale of an electric lighting plant, doing public and private lighting under a public franchise, during the monthly period for which bills to customers are customarily rendered, there being some coal and other supplies on hand for immediate use in that regard, the intention being obvious that the sale was intended to carry, as incident to the property, the going business, nothing appearing to the contrary, such sale impliedly includes such unfinished monthly contracts and the supplies on hand, they being deemed mere incidents of the plant. p. 370.

89. In the trial of an action, if the trial judge at the close of the evidence, as to a matter brought in by amendment on the trial entitling the adverse party to a continuance, announces an opinion as to the effect of such evidence respecting such new matter, having good ground to believe that such announcement will be relied upon by such adverse party, and such party does so rely, and thereafter a decision is rendered materially at

variance with such opinion,—the case should be reopened as to such new matter upon seasonable application being made therefor with reasonable probability that upon a new hearing such adverse party can successfully meet such new matter and is guilty of no inexcusable laches. pp. 374, 375.

90. The undisputed reasonable evidence of one witness, though a party interested, should control as to a question of fact. p. 383.

91. In administering a receivership trust, ordinary advisory orders may properly be granted *ex parte*, and the fact that they are so granted is not evidence tending to show infidelity on the part of the receiver. p. 384.

92. A creditor's expenses, incurred by instituting and prosecuting, prudently and to effect, a suit on behalf of himself and all other creditors of an insolvent corporation, to have its property sequestered and judicially administered for their benefit, may properly be allowed as expenses of such administration. p. 390.

93. The interests of creditors of an insolvent corporation having hypothecations consisting of bills receivable or other choses in action, made by it to secure them,—in property in the hands of a court receiver for the benefit of creditors generally, are not adverse to those of the receiver or such general creditors, there being no question as to the validity of such hypothecations. p. 393.

94. In the circumstances above suggested, legal services rendered the secured creditors as regards enforcing their collateral against the collateral debtors or making formal proof of the principal creditor's claim for filing with the court in the receivership matter, are not inconsistent with the performance of legal services at the same time for the receiver. p. 393.

95. It is not essential nor expected that the general attorney for a receiver whose administration is of such a character as to warrant him in burdening the trust with the expenses of legal services of a general and continuous character, will keep an itemized account of services performed by him. The custom is for the court to allow such sum for expenses of that character as in its judgment the nature of the case reasonably demanded and which were performed. pp. 397, 402, 454.

96. The amount allowable for the personal services of a receiver is to be governed by the subject matter of the administration, the care exercised, the degree of success attained, the manner of the accounting, and all other considerations bearing on the actual value thereof, the rate to be that characterizing somewhat similar services in official life. p. 435.

97. The expenses allowed a receiver for legal assistance are to be governed by the reasonable necessities in that regard, assuming that the receiver has properly discharged the duties which belong to him personally to perform, the time necessarily spent in the administration, the grade of service required, the efficiency of that rendered, the benefit to the trust, the fidelity displayed, and all other circumstances throwing light on the question; the rate to be that ordinarily paid for somewhat similar services in official life. p. 438.

98. The better way to determine the proper amount to be allowed a receiver for legal assistance is to view the whole situation from the standpoint of the results accomplished in the end, without much or any regard to any itemized account. That does not militate against awarding on account reasonable amounts for expenses of that character during the progress of the administration. pp. 394–402.

99. Advisory orders may properly be entered *ex parte* in a receivership matter, and are expected to be so entered as a general rule. p. 384.

100. A receiver is expected to apply to the execution of his trust the discretion of an ordinarily careful business man in business pursuits of a somewhat similar nature, acting in ordinary matters, and as to mere details in others, upon his own judgment without responsibility for losses happening through mere mistakes of judgment. pp. 384, 385.

101. A court, within the boundaries of judicial discretion, may make its own rules as regards the time and manner in which its receiver's account shall be examined and passed upon. p. 414.

102. If a court refers its receiver's account for the taking of testimony and reporting the same with conclusions, such proceeding is not governed by the statute or rules of court regarding references of actions for trial. p. 414.

103. In case of such a reference of a receiver's account, the court may close the same at any time, discharging the referee and causing the whole subject to be brought before him for settlement in the light of such proceedings as shall have been had before the referee, and such other aids as he may call to his assistance, not transcending sound judicial discretion. p. 414.

104. Recitals of fact in a judicial order, the truth of which must be presumed, in the absence of evidence to the contrary, to have been known to, or established to the satisfaction of, the judge making such order, should not be held to be untrue or fraudulent if they may be reasonably viewed in a light which will avoid such result. p. 424.

105. Tested by custom, it is not improper for a referee or a court to delegate to an interested attorney the labor of preparing findings of fact and conclusions of law for the approval and sanction of such referee or court, though the practice itself, aside from such custom, is of doubtful propriety and its discontinuance is advised, this, however, being expressed in the opinion as a personal view of the writer thereof. pp. 396, 419.

106. The mere *pro forma, ex parte* settlement of an important receiver's account, where creditors are dissatisfied therewith, *held* to be an indiscretion. pp. 433, 434.

107. A judge should not sit to review the mere exercise of judgment by his predecessor, but should leave the parties aggrieved to their remedy by appeal. p. 428.

108. Notwithstanding the foregoing general rule, if a judge is clearly satisfied that an order in an action still pending in his court was granted by his predecessor without the exercise of judgment, through mistake or some fraud perpetrated upon the court, or some indiscretion so manifest that the judge granting the same, if in a position to do so, would in all reasonable probability give relief therefrom, or if satisfied that had the adverse parties been heard the result would have been different, and that failure in that regard is attributable to excusable mistake or neglect,—he may set such order aside. p. 429.

109. Money paid on a judicial order or judgment subsequently set aside, may be recovered back in an action for money had and received, payment being presumed to have been made upon the implied understanding that restoration would take place under such circumstances. p. 441.

110. That rule does not apply to a person receiving money from another in the extinguishment of an indebtedness *inter partes*, which money shall have been previously adjudged to such other against a third person, upon the adjudication being vacated, so as to enable such third person to recover the same of the one receiving it. He can recover only of such other. p. 440.

111. A person cannot sue upon one cause of action and recover upon another; but that does not apply where the cause of action is not proved as alleged, yet a liability is established within the scope of the subject stated, and everything in respect thereto is fully litigated so that an amendment might properly be granted conforming the pleadings thereto; nor militate against the rule that, a court of equity having taken jurisdiction of a subject matter for one purpose, which is not fully established on the trial, a liability notwithstanding being established upon a full hearing, within the scope of such subject, the court will

retain the case and grant such relief as is within its jurisdiction to afford. p. 442.

112. A person having property alleged to belong to a trust fund which he ought to restore thereto, being prosecuted for an accounting and charged with having obtained possession thereof by fraud, fraud failing, yet wrongful possession of the trust fund being fully established, the proper judgment enforcing restoration may be rendered. p. 442.

113. If an attorney accepts employment from a receiver, and, joining with his employer, submits to the court the question of the amount to be allowed him out of the trust fund for his services, the result is binding on him till set aside in some appropriate way, though the liability to him is personal as regards the receiver; and if thereafter the receiver pays the sum allowed and subsequently the adjudication in respect to such allowance is properly changed, the allowable sum being reduced, a cause of action thereby accrues to the receiver to recover the excess. p. 444.

114. An implied promise having been raised as indicated in the foregoing, and become enforcible, interest runs from the date of the payment. p. 444.

115. Expense of a receiver in the settlement of his account, caused by creditors contesting matters in respect thereto, which he reasonably incurs, may properly be allowed to him as legitimate charges against the trust fund. p. 446.

116. If in the settlement of the receiver's account only creditors are interested adversely to the receiver, and they all in good faith litigate with the receiver matters respecting his final account, resulting in a judgment for costs being rendered against them, the court may properly provide that such judgment shall be paid out of the trust fund, or, if paid by the creditors, that they shall be reimbursed therefor out of such fund. p. 450.

117. When several defendants severally appeal from a judgment rendered against them, and succeed, there is not necessarily as many prevailing parties as there are individual appellants for the purpose of the taxation of costs in this court, under sec. 2949, Stats. 1898. Such of the appellants as are united in interest are to be deemed as constituting but one prevailing party, though they may have separate appeals. p. 449.

[Syllabus by MARSHALL, J.]

APPEALS from a judgment of the circuit court for Eau Claire county: A. J. VINJE, Judge. *Reversed in part.*

Winding-up action. *James T. Barber* and the McDonough

Manufacturing Company, a corporation, as creditors of the National Electric Manufacturing Company—neither having obtained a judgment against it, and none having been otherwise obtained—commenced an action in the circuit court for Eau Claire county, ostensibly under sec. 3216, Stats. 1898, and its associate sections, against the electric company to sequestrate its property for the benefit of its creditors. The complaint contained numerous allegations showing urgent necessity for removing such property beyond danger of attack by individual creditors, and those usual in such actions, except as to the existence of a creditor's judgment and the exhaustion of all legal remedies to collect the same without success. The action, though in form adversary, was in fact friendly in that the officers of the corporation deemed it advisable that such proceedings should be taken to place the property of the corporation beyond the reach of individual hostile action by creditors, and promoted the same. The person who had been general counsel for the corporation from the time of its organization severed his relations in that regard to take charge of the sequestration proceedings. He prepared the complaint and was the attorney for the plaintiffs. He also prepared the defendant's answer, a brother attorney signing the same and appearing as the defendant's attorney. Such answer admitted the allegations of the complaint.

Upon the pleadings so prepared R. E. Rust, a director and the secretary of the corporation, was in due form appointed receiver of its property. Seasonably thereafter he qualified pursuant to such appointment, and possessed himself of the corporate property. The order of appointment contained the usual injunction as to the commencement of other actions against the corporation and as to the disturbance of its assets in the hands of the receiver or otherwise. Such proceedings were thereafter taken in the action that on June 10, 1893, an order was entered for all creditors of

the insolvent to exhibit their claims against it and come into the action within a time therein specified under penalty of being barred from participating in the distribution of the corporate property. Notice to creditors was given as required therein. September 15th, thereafter, it being supposed that there was a defect in the complaint in such action in that statutory requisites prescribed in sec. 3216, Stats. 1898,—viz., the rendition of a judgment against the corporation, the issuance of an execution thereon, and the return thereof unsatisfied in whole or in part,—were not alleged and that the facts in that regard did not exist, the attorney in such action, himself a creditor of the corporation, obtained a judgment against it, caused an execution to be issued thereon, which was returned unsatisfied, and then commenced a second creditors' action against it in his own name, setting forth substantially the same facts as before, and, in addition, the statutory requisites mentioned. In the commencement of such action he caused F. M. Miner to appear for him as attorney, and the attorney who interposed the first answer to do likewise in the second action. Such second action was treated, as the fact was, as supplementary to the first action. Like such action, while adversary in form, it was in fact in accordance with the desire of the corporate officers and promoted by them. Upon the complaint and answer R. E. Rust was reappointed as receiver by the court, the order recognizing the pendency of the first action, his connection therewith, and the character of the second action as in aid thereof, all his acts under his first appointment being expressly ratified and confirmed. Under the second appointment Rust requalified in due form, and thereafter assumed to be lawfully in possession of the corporate property under the later appointment as well as the earlier one. After the second appointment till the two actions were formally consolidated as hereinafter stated, they were treated as one, all orders and papers being entitled as in both.

R. E. Rust, under such appointments, administered the duties of his office till he disposed of all the property of the insolvent and disbursed the proceeds of the same pursuant to the orders of the circuit court and was discharged. The proceedings immediately leading to such discharge consisted of a petition setting forth the history of the administration and praying for a final discharge and to have the compensation of the receiver and his attorney fixed by the court; an order upon such petition for hearing and for notice of such hearing to be given to all parties interested; the giving of such notice; the filing of objections by certain creditors; an order of reference to take evidence and report the same with findings; a report by the referee; subsequent proceedings in respect thereto that will hereafter appear in detail; the decision by the court thereon; and three orders pursuant to such decision, allowing the receiver's account and fixing his compensation and that of his attorney and counsel, and fully discharging him and exonerating his bondsmen.

After the occurrences above detailed *T. A. Harrigan* and others, creditors of the corporation, filed a petition setting forth reasons for a formal consolidation of the two actions, for the vacation of the orders allowing the receiver's account and discharging him, and the orders respecting his compensation and that of his attorney and counsel, and also certain orders forming the basis for disbursements made by him, and for a reorganization of the action by making the plaintiffs therein defendants, and the petitioners and other creditors who had filed claims, and such others as might choose to participate in the litigation, plaintiffs; and bringing into the action as parties defendant, H. H. Hayden, *Fitch Gilbert,* R. E. Rust, *George T. Thompson, John S. Owen,* D. R. Moon, *A. J. Rust,* the Bank of Eau Claire, the *Chippewa Valley Bank,* the Westville Lumber Company, for the purpose of enabling plaintiffs to litigate all questions as to their responsibility to the insolvent corporation for the benefit of

its creditors growing out of their dealings with the corporation and its property. Such proceedings were taken upon such petition that March 18, 1898, an order was duly entered as follows:

1. Consolidating the two actions into one.

2. Making *James T. Barber* and H. H. Hayden defendants.

3. Dismissing the action as to the McDonough Manufacturing Company.

4. Making *T. A. Harrigan, Morgan Brooks, Fred Bonell, Edward P. Allis Company,* and *Eureka Tempered Copper Company* parties plaintiff, with the right of any and all other creditors of the insolvent corporation to be made such parties plaintiff at any time upon due application to the court and notice to those specially made plaintiffs, or their attorneys, and to the attorneys of the defendants, and upon their sharing equally the expenses and costs of the litigation with those already parties plaintiff.

5. Making T. F. Frawley, *Fitch Gilbert,* R. E. Rust, *George T. Thompson, John S. Owen,* D. R. Moon, *A. J. Rust,* the Bank of Eau Claire, the *Chippewa Valley Bank,* and the Westville Lumber Company parties defendant.

6. Authorizing the plaintiffs in the action as reorganized to serve upon the defendants an amended summons and complaint, tendering such issues to the defendants as they might deem proper, within twenty days from the date of the order.

7. Permitting any defendant so served to answer the complaint within twenty days from the date thereof.

8. Vacating the three orders entered by the circuit court December 30, 1897.

The facts alleged tendering new issues to be litigated, affecting the persons, firms, and corporations brought into the litigation as defendants, were, in the main, these: 480 shares of the capital stock of the corporation were issued, without being previously or thereafter paid for, to persons named as

defendants. The distribution was to existing stockholders ostensibly as a dividend out of surplus assets legitimately applicable therefor. The corporation was then hopelessly insolvent to the knowledge of the recipients of such stock. January 1, 1893, the board of directors of the corporation consisted of *Fitch Gilbert, George T. Thompson,* Peter Truax, *James T. Barber, John S. Owen, Morgan Brooks,* and Ralph E. Rust. *Gilbert* was the president, Rust the secretary, and *Thompson* the treasurer. Rust, Truax, and *Barber* were directors of the insolvent from its organization till its suspension. *Gilbert* and *Thompson* were directors from about 1889, *Brooks* from February, 1891, and *Owen* from October, 1892, till such suspension. During the last year the insolvent was a going concern H. C. and E. B. Putnam were stockholders, and said *Thompson* was a director and the treasurer thereof, and the three were also sole stockholders and directors of the defendant *Chippewa Valley Bank, Thompson* being the cashier thereof. W. A. Rust and H. H. Hayden, two of the stockholders of the insolvent, were largely interested in the defendant Bank of Eau Claire, Rust being the president and Hayden the vice president thereof. The three Rusts were close relatives of each other and of *John S. Owen,* and the four were largely the proprietors of the Rust-Owen Lumber Company and the Westville Lumber Company. D. R. Moon and *James T. Barber* were respectively president and vice president of the Northwestern Lumber Company. The individuals specifically named were intimately associated as officers and directors of the insolvent and otherwise, throughout the period of its existence as a going concern. Hayden was at different times its president, and during the whole of its business existence he was general counsel and manager of its legal business. He was at the same time largely the adviser and legal counsel of all the defendant corporations named, and of the stockholders of the insolvent, and of all the defendants. For several months prior to January 1, 1893, said individuals

were fully informed that the electric company was hopelessly insolvent. About January 1, 1893, to fraudulently secure payment of various sums of money due them in severalty or otherwise, or to the corporations named in which they were interested (the particular items of indebtedness referred to being specified), they formed a fraudulent scheme to divert the assets of the insolvent to the special benefit of themselves and that of the corporations in which they were interested by securing payment to themselves of the indebtedness so specified. Such conspiracy was subsequently fully consummated. In furtherance of such scheme, prior to the appointment of the receiver such individuals caused substantially all the available notes, bonds, bills, and accounts receivable, owned by the insolvent, and contracts in which it had a pecuniary interest, to be secretly transferred to themselves according to their creditor relations to the insolvent, and to the corporations in which they were interested. To further consummate such scheme the participants therein caused the insolvent to make excessive purchases of supplies shortly before its suspension. The two winding-up actions consolidated into this were in fact friendly suits, though in form adversary. Attorney Hayden, who was a director of the insolvent and interested with his associates as aforesaid, in fact directed both sides of both suits and secured the appointment of one of the conspirators as receiver. The proceedings resulted in the appointment of the receiver without notice to the general creditors, the purpose thereof being to forestall any effort on the part of such creditors to obtain an equitable distribution of the assets of the insolvent corporation in a legitimate winding-up proceeding. Further to consummate such scheme they caused the receiver to employ T. F. Frawley, an attorney conversant with the facts, the understanding being that he and said Hayden, though ostensibly acting for the receiver, should in fact cause the latter's administration to be conducted in the private interests of the members of the com-

bine; that they should be in fact attorneys for such members, but assume such an attitude as to enable them to obtain their compensation out of the assets of the insolvent. That part of the fraudulent conspiracy was consummated, $5,000 being paid said Hayden and $11,252 said Frawley, said payments being ostensibly for services rendered to the receiver, whereas the labor performed was largely in aid of the said fraudulent scheme. Further in pursuit of such scheme the receiver, while ostensibly administering his trust, performed much service for the private gain of the members of the combine as holders of hypothecations from the insolvent, taking credit for all such services as receiver, and received the sum of $7,500 which was largely therefor. After taking possession of the property of the insolvent the receiver continued to operate the manufacturing plant for several months, paying the expenses out of the general assets of the insolvent, during which time large amounts of money were expended in completing contracts in which the pecuniary interest of the insolvent had been assigned to members of the combine as aforesaid, and in order that they might realize thereon. He also expended large sums of money in repairing machinery sold under contracts assigned as aforesaid in order that the assignees might realize thereon. The nominal assets of the insolvent aggregated $490,000. The amount realized by the receiver, as claimed by him, was $81,000, subject to the expenses of administering the trust, which expenses, as claimed by him, exceeded the entire amount so realized. Such expenses were, as indicated, largely in aid of the members of the combine to enable them to realize upon the assets of the insolvent assigned to them before the receivership. The plaintiffs had no knowledge of the alleged wrongful scheme, or the facts alleged to have occurred in the consummation thereof, till about July, 1897. That then obtained was not definite. Additional information came to them in such a way that it was not till long thereafter that

they became possessed of the alleged facts in detail as to the consummation of such a scheme.

The prayer for relief was in part as follows: (1) That every defendant stockholder who received stock not paid for in full be adjudged to be liable for the deficiency to the creditors participating in the action. (2) That an accounting be had between the receiver's representatives and the insolvent, of the administration of his office in respect to all matters set forth in the complaint, and such representatives be required to refund all moneys retained by the receiver for services and all lost or wasted by him through his wrongful conduct. (3) That all defendants who received any benefit from assets assigned to them prior to the receivership as alleged in the complaint be required to refund the same by payment thereof into court or to the successor of the receiver. (4) That defendant Hayden be required to refund all moneys received by him from the receiver for services, and that defendant Frawley be required to do likewise.

The defendants thus charged with liability upon the ground of fraud joined issue with the plaintiffs, and D. R. Moon's representatives also pleaded in abatement his death, and the statute of limitations. When the cause was brought up for trial they interposed a demurrer *ore tenus,* which was overruled. A trial was had, with a result which can best be understood, as to the matters to be reviewed here, by giving the substance of the findings in respect thereto. We will proceed to do that.

The allegations of the complaint as to the commencement of the first action being a friendly suit, the second of the same character and in aid of the first, the insolvency of the corporation and the existence of grounds for the winding-up suit when the Hayden action was commenced, were sustained. The indebtedness existing and established in the action by the participants therein at the time of the commencement of the

action, less payments made thereon, obtained from sources other than property in possession of the receiver, such payments, however, having been reported and noted by him, was found to be $226,453.02. It was further found that there were some unreported payments received by some of the creditors from hypothecations, which should go in reduction of their claims. The amount due each creditor on the face of the proceedings was specified. The stockholders of the corporation were exonerated from the charge of having received dividend stock and rendered no consideration therefor, or being liable in respect thereto. As to such stock it was held that there was a *bona fide* surplus of corporate assets over liabilities according to inventories and records made in good faith, and that when the dividend stock was authorized and received the persons immediately concerned in the transaction in good faith believed that such surplus in fact existed and was a proper subject for distribution among stockholders and used by them in payment for the so-called dividend stock. The stockholders, directors, and officers of the corporation were also fully exonerated from having entered into any conspiracy in fraud of the general creditors of the corporation prior to March 15, 1893, and of having, pursuant to any wrongful agreement entered into prior to that time, diverted the assets of the insolvent to their own use as security for pre-existing liabilities of such insolvent to them or to corporations in which they were interested. They were also exonerated from the charge of causing the insolvent to make excessive purchases of supplies between January 1, 1893, and the commencement of the first action, in contemplation of its suspension, or for the purpose of carrying out any agreement between themselves to the prejudice of general creditors. All of the defendants brought into the action by the supplemental complaint were exonerated from all charges of wrong-doing which they were therein called upon to answer for, except as

may otherwise appear by findings of fact, which will be now given in substance, with numbers corresponding to the originals:

72. Between May 15 and May 18, 1893, the defendants determined to speedily close up the business of the insolvent, being convinced that no relief from its financial difficulties could be obtained.

73. All participants in stockholders' and directors' meetings subsequent to May 18, 1893, knew that proceedings would soon necessarily be taken to wind up the corporate affairs.

113. Before the commencement of the first action it was agreed between defendants *Gilbert,* R. E. Rust, Hayden, and *Thompson,* to begin the same so as to forestall any litigation by general creditors, and to thereby secure to themselves control of the corporate assets so that an equitable distribution thereof might be prevented and the defendants be able to secure an unlawful preference as to claims held by them and by corporations in which they were interested; and also to secure large sums of money out of such assets for pretended services in relation to the receivership.

114. R. E. Rust's first appointment was secured pursuant to such agreement. He participated in the preconceived plan aforesaid, and aided in carrying it out until his discharge.

115. He retained T. F. Frawley as his attorney, who, about that time, was fully advised of such preconceived scheme. Thereafter, till the receiver was discharged, he aided in carrying out such scheme.

116. From September 4, 1891, until immediately before the receiver's appointment, Hayden was general counsel for the insolvent. He resigned such position to take service under the receiver May 23, 1893, continuing therein till the receiver was discharged, and aiding from first to last in carrying out said scheme.

117. Had the receivership matter been properly handled it would have been closed up in about eighteen months.

118. In 1894 the receiver collected $6,353.95, $2,623.24 being for the benefit of parties holding hypothecations made by the insolvent before its suspension.

119. In 1895 $1,744.91 was collected.

120. In 1896 $5,824.16 was collected, substantially all being from one creditor, and through the medium of a mercantile agency.

121. $757.36 was collected in 1897.

122. The receiver realized from the corporate property $88,000 in all, which included $11,000 collected on hypothecations held by certain of the defendants, the same being paid to them by order of the court.

123. The receiver, by court order, operated the manufacturing plant for a time, exceeding his authority, however, by borrowing $19,500 when his power in that regard was limited to $5,000.

124. The receiver's inventory was filed October 19, 1893. Soon thereafter it was removed from the court files, since which time no trace of it has been found though diligent search therefor has been made by the clerk of the circuit court.

125. Soon after the receiver's appointment the stockholders of the insolvent, the Bank of Eau Claire, the *Chippewa Valley Bank,* and the Westville Lumber Company, through attorneys Hayden and Frawley, filed proofs in due form of their respective claims against the insolvent, no mention being made of security turned out before the suspension of the corporation, held by the claimants.

126. No report was filed by the receiver till June 23, 1897. Until then, general creditors were ignorant of the administration of affairs by him.

127. Prior to such date none of the creditors, other than

those named as defendants, were familiar with any of the matters connected with the handling and disposition of the assets of the insolvent.

128. Knowledge of the pledging of corporate assets before the suspension was confined to those immediately concerned in giving and taking the security.

129. May 16, 1892, *Gilbert, Thompson,* and R. E. Rust, for the accommodation of the insolvent, indorsed its $8,000 note to the National Exchange Bank of Milwaukee. The note was renewed from time to time with the same indorsements, the last being January 18, 1893, when the indorsers received from the insolvent, as security, an assignment of an electrical plant at Brookfield, Indiana, which was invalid. May 18, 1893, the insolvent mortgaged such plant to the indorsers to secure them, no consideration, however, then passing between the parties. The mortgage was recorded in Indiana the day R. E. Rust was first appointed receiver, the expense thereof being subsequently charged against the assets of the insolvent. The mortgage was given to allow, and taken to obtain, an unlawful preference, defendant Hayden acting for the parties to the transaction with knowledge of all the facts.

130. In aid of the original fraudulent scheme the receiver, *Gilbert, Thompson,* Frawley, and Hayden, July 12, 1893, obtained a court order to sell such plant at private sale for the amount due the National Exchange Bank of Milwaukee, if practicable, otherwise to make public sale thereof upon ten days' notice in an Eau Claire paper.

131. Prior thereto it was agreed between *Thompson, Gilbert,* and the receiver to become owners of the plant by private purchase.

132. That was well known to Hayden and Frawley, who participated in consummating the same, securing in aid thereof the order before mentioned.

133. July 18, 1893, such plan was consummated, the property being conveyed in form to *Thompson,* the real purchasers, however, being *Thompson, Gilbert,* and the receiver. The purchase price for the property was $8,287.20, the limit mentioned in the order as to the making of a private sale. The sale was reported to the court in form and confirmed.

134. The value of the plant when sold was the amount paid therefor.

135. Upon the sale being confirmed the receiver furnished *Thompson* a copy of the order authorizing it, a copy of the report of sale and of the order confirming the same, and the receiver's deed, taking a receipt therefor. The court, throughout, was kept in ignorance of the interest of *Thompson* and the receiver in the sale.

136. At the time of the sale, by book account, the Brookville plant owed Rust, receiver, $1,160.30.

137, 138. He was familiar with the facts in reference to the account.

139. Soon after the sale the parties interested formed a plan for organizing a corporation to take over the title to the property. That was consummated, the stock of the corporation being issued in equal proportions to R. E. Rust, *Gilbert,* and *Thompson.* The plant was thereafter operated for their benefit.

140, 141. The amount due from the Brookville plant to the receiver at the time of the sale was $556.50. That was wrongfully appropriated, by the parties concerned in the sale, to their own use.

142. Subsequent to the sale the parties interested conceived the idea and agreed to take the property as of the date of their mortgage thereof, May 18, 1893, instead of as of the date of the sale.

143. That was not known or authorized by the court.

144. Had the property been sold as of May 18, 1893, the

amount coming to Rust, receiver, on the account against the Brookville plant, would have been $450.32.

145. Said sum was wrongfully appropriated by the parties to the sale, to their own use in operating the plant after May 18, 1893.

146. March 15, 1897, the receiver, under oath, informed the court that the account against the Brookville plant at the date of his appointment was $1,196.40, and was uncollectible and worthless.

147. Such proceedings were had that such account, with others, aggregating $22,000 face value, were in form, June 27, 1897, sold for $49.50, a court order having been obtained authorizing a sale thereof, the court being informed that the property was worthless.

148. When such representation was made as to the Brookville plant account, the receiver knew that $556.50 had been collected and made available to pay the same, but had been converted by him and his associates to their own use.

149. Prior to the receivership an account of $1,550, due the insolvent from the Consolidated Engineering Company, had been assigned to R. E. Rust, *Gilbert,* and *Thompson* as security for their endorsements on a $3,500 note to the Bank of Eau Claire.

150. After the receivership commenced that account was garnished. The assignees intervened and were successful. Litigation followed against the debtor in the name of the receiver, resulting in the collection of $866.66, which was paid to him. All such litigation was conducted by or through the mercantile agency of R. G. Dun & Co.

151. Subsequent to the aforesaid collection the court was informed by the receiver that the money in fact belonged to him personally, and to *Thompson* and *Gilbert.* Payment thereof was ordered accordingly

152. Prior thereto the receiver expended $145 of receivership money in making the collection.

153. *Thompson* and *Gilbert* knew when they participated in the matters respecting such account, that T. F. Frawley was acting for them in the matter at the expense of the receivership.

154. Frawley was paid $430 out of the receivership assets for his services in respect to such account.

155. The receiver acted with knowledge of the facts in regard to the receivership assets bearing the burden of collecting said account.

156. June 21, 1893, Rust, as receiver, charged to *Gilbert* and *Thompson,* $10.75 for expenses respecting an hypothecation held by them, and later obtained permission to charge the same to receivership expenses.

157. A contract between the insolvent and the Bucyrus Steam Shovel & Dredge Company was hypothecated, before the suspension, to *Thompson, Owen, Gilbert,* and Moon as security for their indorsement of a $12,000 note to the National Exchange Bank of Milwaukee.

158. The insolvent had agreed to install for said company, before December 15, 1892, certain electrical machinery, R. E. Rust, *Thompson,* and C. A. Daigh guaranteeing performance. The agreement provided for $50 per day damages for delay and the guarantee covered that feature.

159. By May 23, 1893, $5,510.09 had been expended upon the contract, or $960.09 in excess of the contract price for installation.

160. May 23, 1893, said Bucyrus Company, independent of the aforesaid contract, owed the insolvent $1,795.34.

161. When the receiver was appointed, he, *Gilbert, Thompson, Owen,* and Moon knew the proceeds of the aforesaid contract would be required to discharge the note to the National Exchange Bank of Milwaukee.

162. June 6, 1893, the receiver notified *Owen* that the contract was not completed and that there was a generator on hand designed to be used for that purpose, and that he could

not go on with the contract without the assignees thereof guaranteeing payment for such machine; that upon security being given him for $2,500 for the machine, within a reasonable time, it would be used as designed.

163. July 1, 1893, the receiver informed the court in writing of the Bucyrus Company contract, the assignment thereof, and that the assignees required him to complete the same or to deliver to them the property designed therefor. The court was further informed that the aforesaid generator was of the value of $1,500, and requested to give directions in the premises. Thereupon the receiver was ordered to ship the generator, to collect all the money payable upon the contract for the benefit of the assignees thereof in excess of $1,500, and to hold that for further advice. Prior to such proceedings the Bucyrus Company notified Rust, *Thompson,* and *Gilbert* that their liability for the stipulated damages heretofore mentioned would be enforced.

164. Between September 14 and November 16, 1893, the receiver expended in completing the Bucyrus contract, $2,646.24, without any judicial authority except as aforesaid.

165. February 7, 1894, the receiver informed the court of the facts with reference to the Bucyrus contract, that the contract had been completed, that $5,986.95 was due thereon, that payment had been refused and would have to be enforced by judicial proceedings, and that it was in the interests of the general creditors that he should do so free from any claim of *Gilbert, Thompson, Owen,* and Moon. Judicial authority to do that was asked for, the fruits of the proceedings, when obtained, to be subject to the claim of *Gilbert, Thompson, Owen,* and Moon by reason of the contract assigned to them as aforesaid. They consented thereto.

166. Before the last circumstance occurred the Bucyrus Company paid the receiver, independently of said contract,

$600, leaving due from such company on the independent account, an undisputed balance of $1,195.34.

167. At the time of the occurrence stated in 165 the situation as to dealings with the Bucyrus Company contract stood thus: The amount expended prior to the suspension and remaining unpaid was $5,710.09; the amount due outside the contract was $1,195.34; the amount expended by the receiver in executing the contract was $2,646.24.

168. Further, at the time of such occurrence, all parties concerned knew that nothing could be realized from the Bucyrus Company for general creditors.

169. As per judicial consent given, the receiver commenced judicial proceedings to enforce a lien against the property of the Bucyrus Company to the extent of $5,996.95.

170. His attorney in such matter, T. F. Frawley, was paid out of the assets of the insolvent for his services in the matter $446.80. Other expenses were incurred in such matter to the extent of $187.90.

171. Nothing was realized therefrom, the result being that the sums expended in respect thereto were wholly lost.

172. *Gilbert, Thompson, Owen,* and Moon, in participating in the receiver's handling of such matter, purposed having the expenses of collecting their claim paid out of receivership money.

173. When said generator was used as aforesaid, it was charged by the receiver to *Gilbert, Thompson, Owen,* and Moon. Thereafter he obtained an order of court exonerating such parties therefrom.

174. Previous to the receiver's appointment the insolvent hypothecated a $1,500 account against the Bigelow Electric Supply Company to *Gilbert* and *Thompson* as security for their indorsement of several of its notes. After such appointment the receiver paid $127.36 out of receivership money in collecting the collateral for the holders thereof, all concerned

knowing that it was to the prejudice of the general creditors. The receiver also paid out of the assets of the insolvent, to Attorney Frawley, $214.90 for services in respect to the enforcement of such collateral.

175. During the time the insolvent did business, it installed at Asheville, North Carolina, an electrical plant for the contract price of $32,000, receiving as part payment bonds from the People's Light, Heat & Power Company, of Asheville, of the face value of $14,500. The total issue of such bonds was $17,000. March 23, 1893, $6,000 thereof were held by the *Chippewa Valley Bank* as collateral; $5,000 by M. G. Shaw for the same purpose; $3,500 by the insolvent; $1,500 by J. A. Lyman of Asheville, and $1,000 by W. Barnhart of Asheville.

176. A short time before the appointment of the receiver, $1,000 of the bonds were sent to Asheville to be used in payment for certain real estate upon which the electric plant had been constructed, but the owner would not accept the same.

177. Shortly prior to such appointment the Asheville plant had been sold by the bondholders and bid in by H. B. Walmsley for $5,001 for those other than the ones residing at Asheville. The latter refused to become parties to the purchase. Their part of the proceeds of the sale was $735. It was necessary to pay that, and $1,100 for land upon which the plant was constructed.

178. The receiver had no judicial direction, nor did he ask for any, in respect to protecting the interests of the general creditors in the Asheville bonds, except as herein stated.

179. Immediately after his appointment he began to deal with the Asheville bonds held by him, and the Asheville plant, as individual owner thereof. Such conduct continued until he was discharged. In that he was guilty of wrongful conduct as follows: In not disclosing to the court the ownership of the bonds sought to be used in payment of the real estate upon which the plant was situated; in disclosing to the court

the ownership, as assets of the insolvent, of but $2,500 of such bonds when the amount was in fact $3,500; in representing to the court by verified petition that prior to the receivership the insolvent had contracted to install the plant at Asheville and that the contract had been assigned to *Thompson,* Shaw, and himself as security for moneys loaned the insolvent, knowing that no such assignment had been made and that the plant had been completed long prior to the receivership and sold as aforesaid; in concealing from the court that machinery had been sold by him from the Asheville plant for $1,400; in endeavoring through his attorney to obtain judicial authority to sell to himself, as property of no value, the Asheville bonds forming a part of the assets in his hands as receiver, representing such bonds to be $2,500.

180. June 27, 1897, said Asheville bonds, with other assets, aggregating $22,000, were in form sold to De Alton S. Thomas for $49.50.

181. The receiver fraudulently converted to his own use the $3,500 of Asheville bonds, they being then worth, reasonably, $1,000.

182. July 30, 1895, he expended, as expenses in connection with the Asheville plant, $524.26, charging the same to himself and *Thompson.*

183. Subsequent to April 8, 1897, the receiver, represented by his attorney, petitioned the court for and obtained an order in effect making such charge of $524.26 expenses of the receivership.

184. Soon after the receivership commenced the receiver began personal suits at Asheville as part owner of the Asheville bonds, which suits are still pending.

185. Defendant Hayden was and is one of the attorneys in such litigation.

186. Such wrongful conduct of the receiver was with the knowledge of Frawley, Hayden, and *Thompson.*

187. The charge against *Thompson* respecting the Ashe-

ville plant was properly chargeable to the *Chippewa Valley Bank* as holder of the Asheville bonds as security.

188. Prior to August 6, 1896, the receiver expended $161.71 respecting an account against Armour & Co. of Chicago, assigned by the insolvent to the *Chippewa Valley Bank* prior to the suspension, charging the same to *Thompson,* its cashier, the parties concerned knowing that nothing could be realized in any event for general creditors. Thereafter the receiver, by order of the court induced by him, made such charge a part of the general expense of the receivership.

189. The receiver paid out $853.80 in completing a contract with the St. Louis Electric Light & Power Company, hypothecated to *Gilbert,* Rust, and *Barber* prior to the suspension, he, and the parties to be benefited, knowing that nothing could be realized for the benefit of general creditors. The expenditure was first charged to the parties beneficially interested, but afterwards to the expense of the receivership administration.

190. Prior to July 1, 1893, the receiver paid $51.20 in completing a contract assigned to Rust, *Gilbert,* and *Thompson* as security, all parties concerned knowing that nothing could be realized for general creditors.

191. He used $184.97 of receivership assets in the collection of an account against the National Electric Manufacturing & Construction Company of New York, knowing that it was held by the *Chippewa Valley Bank* as security.

192. He and the officers thereof knew that nothing collected upon said account could go to general creditors.

193. Before the receivership the insolvent hypothecated an account due to it from Caspari, Whittaker & Co. as follows: $1,550 to *Thompson* and *Gilbert;* $1,150 to said *Thompson* and *Gilbert* and R. E. Rust; $2,880 to said *Gilbert;* and subsequently to the appointment of the receiver, with the knowledge and consent of said parties, he expended

out of the assets of the insolvent $369.72 on account of such security.

194. When such expenditure was made the receiver and all parties concerned knew that nothing could be realized upon such security for the benefit of general creditors.

195. April 8, 1897, the receiver informed his attorney that he had an account against *John S. Owen* and others for $1,500 for the machine, used in executing the Bucyrus contract, one against *Gilbert,* Rust, and *Barber* of $853.88 used in executing the contract with the St. Louis Electric Light & Power Company; one against *Gilbert,* Rust, and *Thompson* of $10.75 for expenses incident to an account against the Globe Shoe & Clothing Company of St. Louis; one against Truax for $46.51, used respecting an account against Cook County Hospital; one against *Thompson* of $161.71, for expenses as to an account against Armour & Co.; one against *Thompson,* Shaw, and Rust of $524.26, for expenses as to an account against the Asheville plant; and that he desired the court to release the debtors because he had been unable to collect anything upon the accounts; that an account known as the Asheville bond account, for $2,500, was of no value, and he desired authority to sell it to himself.

196. Thereupon the attorney prepared a petition to be and which was verified by the receiver, setting forth the existence of such accounts; that when the expenditures were made it was supposed there was a margin in the collaterals realizable for general creditors; that none of the parties against whom the charges were made realized any benefit therefrom; that they insisted they were not justly chargeable therewith, and that the receiver coincided with that view.

197. The receiver and his attorney and counsel then knew that no further sum could be collected upon the hypothecations involved. Their purpose was to wrongfully relieve the debtors from their liability to pay the expenses.

198. No proceeds from any of the hypothecations inured to the benefit of general creditors.

199. All expenditures made by the receiver respecting them were known by him and the holders thereof to be for the benefit of the latter.

200. From beginning to end the receivership was managed by Rust and his attorney and counsel for their sole personal benefit and that of *Thompson* and *Gilbert* and the *Chippewa Valley Bank,* pursuant to the original fraudulent scheme stated.

201. It was part of such scheme that all the assets of the insolvent should be absorbed without paying anything to general creditors.

202. Frawley charged the receiver for all services rendered for him, and all for the persons holding the hypothecations as well.

203. Such charges were largely in excess of what was reasonable in any event, as for instance: $1,450 in connection with the sale of the manufacturing plant for $7,500, a reasonable charge being limited to $200; $500 for preparing a petition for confirmation of the sale of the plant and an order to that effect, whereas $50 would have been reasonable; $265 in connection with the sale of the Brookville plant, while a reasonable charge could not have exceeded $50.

204. Frawley charged the receiver large amounts, and received the same out of receivership money, for services not rendered by him at all, as, for example: $100 for collecting of the Monroe Water Works & Lighting Company, the services being rendered by *John S. Owen;* $100 for collecting $2,550 upon certain bonds, the services being rendered by the *Chippewa Valley Bank;* $50 for collecting $1,104.09 of the Ball Electric Company, payment being in fact made directly to the receiver and the money turned over to Peter Truax who held the claim against said company as collateral; $50 for collecting $1,130 on a note, the services being in fact ren-

dered by *Gilbert,* who was the owner thereof; $120 for collecting $2,500 of the Pennsylvania Electric Company; $60 for collecting $1,530 of Chas. H. Baker; $20 for collecting $275.75 of the Reis Electric Specialty Company; $50 for preparing a paper in the sale of the Brookville plant, it being in fact prepared, to the attorney's knowledge, by H. H. Hayden, who made a charge therefor.

205. His total charges were $8,218.31, though he was allowed in addition, $3,092.42.

206. On several occasions during the administration of the receivership, to the prejudice of general creditors he presented petitions to the court, signed by the receiver, containing representations known by the parties to be false, and omitting therefrom facts requisite for the court to know in order to act intelligently.

207. During Attorney Hayden's professional career of many years prior to the receivership, his uniform custom was to charge upon his books in detail for all professional services rendered.

208. His charges against the receiver aggregated $429.74 for services and $50 for expenses.

209. That included an item of $200 for services in obtaining the first appointment of the receiver. It was originally charged to *James T. Barber,* one of the plaintiffs in the first action, but later charged to the receiver.

210, 211. In each instance where he rendered a service for the receiver he charged therefor, all such charges amounting to 429.74, as indicated.

212. He obtained, for services rendered the receiver, $4,952.02 and $50 for expenses, pursuant to the aforesaid fraudulent scheme.

213. While acting for the receiver he also acted as attorney for various persons holding hypothecations, his attitude being sometimes in hostility to general creditors. His services in the whole were compensated for by receivership

moneys obtained as aforesaid, the total exceeding the actual value of his services for the receiver by $4,047.82.

214. *Ex parte* orders were obtained by Frawley, acting as attorney for the receiver, June 11, 1894, allowing the latter $4,000 as part payment for services, and himself and Hayden each $3,000.

215. Payments to Hayden were as follows: $1,000 January 15, 1894; $2,000 June 18, 1894; $1,952.02 December 30, 1897, in addition to the $50 for expenses.

216. Payments to Frawley were as follows: $2,000 January 3, 1894; $1,000 June 11, 1894; $8,341.63 December 30, 1897.

217. Those to Frawley included $197.61 for expenses.

218. Those to Rust, receiver, were as follows: Prior to June 11, 1894, $4,000; December 30, 1897, $3,427.82.

219. Seasonably after the filing of the receiver's report defendant Truax, on behalf of himself and another, both being large creditors, filed objections thereto and petitioned the court for a reference to a referee for an investigation of the disputed matters, and a report of the evidence taken in that regard to the court.

220. The petition was granted, the reference, however, being to take the evidence and report the same with the referee's conclusions as to the facts, and particularly to take the evidence and report in respect to items charged for legal services, the same being classified under several heads.

221. The contestants, by their attorney, endeavored to have the order not require the referee to make findings, while Hayden and Frawley urged that it should include such duty, and prevailed in that regard.

222. December 21, 1897, while the referee was engaged in the performance of his duties, Frawley secured an *ex parte* order requiring him to conclude the same and file his report by December 27, 1897. Later he obtained another *ex parte*

order that the referee should file his report by December 30, 1897.

223. The taking of testimony ended that day. On the same day Frawley prepared the report, with findings of fact. The next morning the referee signed it, and with the evidence, consisting of from 500 to 600 typewritten pages, and all other papers in his hands respecting the cause, filed the same with the clerk of the circuit court, the court being in session, and Frawley, Hayden, and the receiver being present.

224. Thereupon Frawley, Hayden, and the receiver caused verbal notice to be given to the contestants' attorney that the court was ready to pass upon the report. Such attorney, treating such notice as imposing no duty upon him, did not visit the court.

225. The report was not submitted to such attorney, nor did he have any notice, other than as aforesaid, of any proceedings in respect thereto on December 30, 1897. His conduct was based on the statute and the court rules, which were well known to Frawley and Hayden and the receiver, as to notice of proceedings upon the report of a referee after the filing thereof. The findings specially directed to be made by the referee were intentionally omitted from his report, his conduct in that regard being brought about by Hayden, Frawley, and the receiver.

227. Upon Hayden and Frawley becoming advised that the attorney for the contestants would not appear and participate in the hearing on said day, they and the receiver held a consultation at the courthouse, the Revised Statutes, and the rule of court in respect to the treatment of referees' reports being discussed, resulting in a determination that, so long as the report and findings as prepared remained on file, the court had no power to make or enter any order in respect to the matter before the expiration of ten days, and that the term of office of the presiding judge would expire within that time.

Hayden, Frawley, and Rust then agreed, in furtherance of the aforementioned fraudulent conspiracy, that if they were to secure an order on the report on that day, such report and the findings as prepared by Frawley and on file must necessarily be withdrawn and a different report substituted. Thereupon, by concert of action by all of the parties named, such withdrawal fraudulently occurred and said parties caused to be prepared a brief certificate merely certifying, by the referee, that he had taken certain testimony and reported the same to the court. After such preparation a messenger in the employ of Mr. Frawley was sent to the referee to obtain his presence. Soon thereafter the referee arrived at the courtroom, and thereupon he, Frawley, Hayden, and Rust retired to a small room adjoining such room, for consultation, a suggestion to do so being made to the referee by the other parties named. In such room at that time, Frawley, Hayden, and Rust submitted to the referee the certificate prepared as aforesaid, requesting his signature thereto and stating that the circuit court had ordered his report and findings to be withdrawn from the files and such certificate to be substituted for the findings. The statute and circuit court rule before mentioned were considered at that time. The result of the consultation and the statements made to the referee was that the latter complied with the request of his associates to sign said certificate. Thereafter such certificate was attached to the papers in place of the findings, and the same were then filed by the referee with the clerk.

228. Upon the filing of the new report, Hayden and Frawley presented to the court and obtained judicial sanction of orders allowing the receiver's account and discharging him, and exonerating his bondsmen, and fixing the compensation to be paid to him for his personal services, and the amount to be allowed to him for expenses incurred in the employment of Mr. Hayden as his counsel and Mr. Frawley as his attor-

ney, and of their filling those positions during the term of the receivership.

229, 230. In preparing the final order Frawley and Hayden embodied therein recitals in substance as follows: The attorney of the contestant procured an enlargement of the time for filing the referee's report till December 30, 1897, to permit of his taking evidence as to the value of the services of the receiver, his attorney, and counsel. Prior to such enlargement, the court directed that such report should be filed before December 30, 1897, at which time the matter in dispute would be heard and disposed of by the court. The parties consented thereto and the referee having filed his report of the evidence, and the same being in the form required by the court, to wit, that he should report the evidence taken upon the hearing, such being the construction placed by the court upon its order of reference, being an order of reference to take and report the evidence.

231. The idea of such attorneys in making such false recitals was that the term of court would end December 30, 1897, precluding creditors of the insolvent from attacking the order except upon appeal, where such recitals would be regarded as verities.

232. By December 15, 1897, Frawley, Hayden, *Gilbert, Thompson,* and the receiver, knew an organization of general creditors existed, bent on securing an investigation of the receivership matters, and obtained the orders mentioned, supposing they would preclude such an investigation.

233. The allowances made to the receiver and attorneys December 30, 1897, exceeded the entire available assets in the hands of the receiver, so they divided what there was between themselves *pro rata,* each bearing his proportionate share of the deficiency.

234. No effort was made in the receivership proceedings to enforce payment of any of the insolvent's accounts by the judgment of the court.

235. All court orders in the receivership proceedings were obtained *ex parte.*

236. The services performed by the receiver and by Frawley and Hayden were fraudulent and valueless to general creditors.

237. The reasonable value of the receiver's services, honestly rendered, would not exceed $4,000.

238. That of the services of Frawley, $3,000.

239. That of the services of Hayden, $300.

240. Except as indicated, the charges against the defendants, contained in the complaint, are not sustained.

The conclusions of law reached by the court upon such findings, necessary to appear here, other than those common to winding-up actions, are these in effect: (4) Judgment for $84.50, with interest thereon from June 18, 1893, should be rendered against defendant *Gilbert,* for receivership moneys wrongfully applied by him as indicated in finding 75. (5) Judgment should be rendered against defendant *Owen* for $129.52, with interest from July 21, 1893, on account of a wrongful depletion of receivership assets as indicated in finding 87. (7) A joint judgment should be entered against *Gilbert,* and *Thompson,* and W. A. and *A. J. Rust* as executors of the last will and testament of R. E. Rust, deceased, for $8,287.20, with interest from July 17, 1893, because of the fraudulent disposition of the Brookville plant as indicated in the findings. (8) A like judgment should be entered against such parties for $556.50, with interest from July 17, 1893, for money due R. E. Rust as receiver, from the Brookville plant, and illegally appropriated by said *Gilbert, Thompson,* and R. E. Rust personally. (9) And a like judgment should be rendered for $155.72 and interest thereon from August 18, 1894, on account of receivership moneys used for the benefit of *Gilbert, Thompson,* and R. E. Rust respecting the account against the Consolidated Electrical Engineering Company of St. Louis, Mo. (10) Also a like judg-

ment for $51.20, and interest from July 1, 1893, on account of receivership moneys expended for the benefit of *Gilbert* and *Thompson* respecting the Cassadaga Free Association account. (11) And a like judgment against *Gilbert, Thompson, Owen,* and said Rusts as executors as aforesaid, and *Sumner G.* and *Frank H. Moon* as administrators with the will annexed of D. R. Moon deceased, for $2,834.14, with interest from March 18, 1896, on account of receivership moneys dissipated for the benefit of *Gilbert, Thompson, Owen,* R. E. Rust, and D. R. Moon, respecting the Bucyrus contract. (12) A like judgment against the *Chippewa Valley Bank, Thompson,* and the Rusts as executors as aforesaid, for $524.26 and interest from July 30, 1895, on account of receivership moneys used respecting the Asheville plant for the benefit of said bank, *Thompson,* and R. E. Rust. (13) A judgment against the Rusts, as executors as aforesaid, for $1,000, and interest from October 1, 1893, on account of the value of the Asheville bonds converted by R. E. Rust to his own use as indicated in the findings of fact. (14) Also a joint judgment against *Gilbert, Thompson,* and the Rusts as executors as aforesaid, for $127.30 and interest thereon from January 14, 1895, because of receivership moneys wrongfully used respecting the Bigelow Electrical Supply Company account. (15) A like judgment against the *Chippewa Valley Bank, Thompson,* and the Rusts as executors as aforesaid, for $161.71 and interest thereon from August 6, 1894, because of receivership moneys wrongfully used respecting the Armour & Co. matter. (16) A like judgment against *Gilbert, James T. Barber,* and the Rusts as executors as aforesaid, for $853.80 and interest thereon from August 25, 1893, because of a depletion of the assets of the insolvent respecting the contract with the St. Louis Electric Light & Power Company, mentioned in the findings. (17) A like judgment against the *Chippewa Valley Bank,* and the Rusts as executors as aforesaid, for $184.97 and interest from August 6,

1896, for receivership moneys wrongfully used respecting the National Electric & Construction Company account. (18) A like judgment against *Gilbert, Thompson,* and the Rusts as executors as aforesaid for $369.72 and interest thereon from June 6, 1894, on account of receivership moneys wrongfully used respecting the Caspari, Whittaker & Co. account. (19, 20, 21) No compensation should go to either the receiver, T. F. Frawley, or H. H. Hayden, because of wrongful conduct in the receivership proceedings. (22) A joint judgment should be entered against the Rusts as executors, and Frawley and Hayden for $23,523.86, with interest from January 3, 1894, on $2,000; from January 15, 1894, on $1,000; from June 11, 1894, on $5,000; from June 18, 1894, on $2,000; and from December 30, 1897, on $13,523.86. (24) All orders entered in the receivership proceedings prior to and inclusive of the time of the discharge of the receiver should be modified or set aside so far as inconsistent with the foregoing. (26) Costs in favor of the plaintiffs should go, generally, against defendants *Barber* and *Gilbert,* W. A. and *A. J. Rust* as executors as aforesaid, *Thompson, Owen,* and *Sumner G.* and *Frank H. Moon* in their capacity as personal representatives of D. R. Moon, H. H. Hayden, T. F. Frawley, and the *Chippewa Valley Bank,* in a sum not exceeding $500 in addition to taxable disbursements.

Judgment was in due time perfected in accordance with such findings and conclusions and others not necessary to specially mention. Eight separate appeals were taken therefrom, the findings and conclusions involved as to each having been duly excepted to. The following is a detailed statement of such appeals, and, in brief, the ultimate questions raised and the findings challenged:

1. Appeal by W. A. and *A. J. Rust,* as executors as aforesaid, the ultimate complaint being of that portion of the judgment charging them with liability for $1,395.67, principal and interest, for the conversion of the Asheville bonds men-

tioned in conclusion 13, and, generally, for costs according to conclusion 26, the findings of fact excepted to being 175 and 178 to 181 inclusive

2. Appeal by the *Chippewa Valley Bank, George T. Thompson,* and W. A. and *A. J. Rust* as executors as aforesaid, complaining of being charged with liability for $524.26, $161.71, and $184.97, with interest thereon, aggregating $1,128.04, because of the misuse of receivership moneys as indicated in conclusions 12, 15, and 17, and with liability for costs as per conclusion 26; the findings of fact in respect to the matter excepted to being 182, 183, 188, 192, 199, and 200.

3. Appeal by defendants *Gilbert* and *Owen,* W. A. and *A. J. Rust* as executors as aforesaid, and *S. G.* and *F. A. Moon* as personal representatives of D. R. Moon deceased, complaining of the judgment charging them with general liability for costs under conclusion 26, and with liability for $2,834.14 with interest, making $3,536.02, for receivership moneys wrongfully appropriated as held in conclusion 11; the findings excepted to in respect thereto being 159, 161, 163, 164, 168, 170, and 172.

4. Appeal by *Gilbert, Barber,* and the Rusts executors as aforesaid, from those parts of the judgment charging them with liability for costs as per conclusion 26, and for $853.80 with interest, making in the aggregate $1,196.68, on account of a wrongful depletion of receivership assets as indicated in conclusion 16, the findings of fact excepted to being 189, 199, and 200.

5. Appeal by *Gilbert, Thompson,* and the Rusts as executors, from the adjudged liability against them for costs as per conclusion 26, and liability for $8,287.20 and interest thereon, on account of the illegal disposition of the Brookville plant as indicated in conclusion 7; and $556.50 with interest, for the misappropriation of the proceeds of an account due from such plant as indicated in conclusion 8; and $155.72

with interest, for moneys misappropriated in respect to the Consolidated Electrical Engineering Company as indicated in conclusion 9; and $51.20 with interest, for moneys misappropriated in connection with the Cassadaga Free Association account, as indicated in conclusion 10; and $2,834.14 with interest, for a wrongful dissipation of the receivership assets in respect to the Bucyrus contract as indicated in conclusion 11; and $127.30 and interest, for wrongful appropriation of receivership assets in respect to the Bigelow Electrical Supply Company account as indicated in conclusion 14; and $369.72 and interest, for misappropriation of receivership assets in respect to the Caspari, Whittaker & Co. account as per conclusion 18; the aggregate being $13,436, exclusive of costs; the findings of fact excepted to being 72 to 133 inclusive, 135, 136, 138 to 145 inclusive, 147, 148, 153, 154, and 155.

6. Appeal by H. H. Hayden, T. F. Frawley, and the Rusts, executors, from the adjudged liability against them for costs as per conclusion 26, and liability for $23,523.86 and interest, aggregating $29,071.90, on account of moneys wrongfully obtained by them out of the receivership assets as per conclusion 22, the findings of fact in respect thereto excepted to being 113 to 128 inclusive, and 176 to 187 inclusive.

7 and 8. Appeals by defendants *Gilbert* and *Owen* from the judgment in respect to several matters, and among them their adjudged liability for $182.94 and $113.58, respectively.

The form of the notices of appeal, as to whether single or not, was this: the parties, joining, "severally and separately appeal." The form of the bond as to each appeal, except those numbered 6 and 7, respecting the same feature, was as follows: "The above named appellants, feeling aggrieved thereby, intend to appeal, now therefore we, etc., do hereby, pursuant to the statute in such case made and provided, un-

dertake that said appellants will pay all damages and costs which may be awarded against them on said appeal, not exceeding the sum of $250, and do also undertake, etc., the said appellants will pay the amount to be directed to be paid by that part of said judgment so appealed from, etc., affirmed," etc. The other two bonds, as to such feature, though worded somewhat differently, were substantially the same. After the record was filed in this court the respondents moved to dismiss all of the appeals for insufficiency of the bonds in that, while as to each appeal there were several parties appellant, each appealing for his own behalf, there was but one appeal bond. Thereafter, and before such motion was heard, the appellants moved the court for leave to give a new bond curing the defects claimed by respondents to exist in those on file.

The cause was first argued and submitted on October 25 and 26, 1902.

For the appellants, upon the motion to dismiss the appeals, there was a brief signed by *H. B. Walmsley,* attorney for H. H. Hayden, by *C. T. Bundy* and *R. P. Wilcox,* attorneys for the other appellants, and by *W. P. Bartlett,* of counsel for W. A. and *A. J. Rust,* executors of the last will of R. E. Rust, deceased. Upon the merits there was a brief signed by *Frawley, Bundy & Wilcox,* attorneys for appellants other than H. H. Hayden, and by *W. P. Bartlett,* of counsel for W. A. and *A. J. Rust,* executors; a separate brief signed by *H. B. Walmsley,* attorney for H. H. Hayden; a supplemental brief signed by *Frawley, Bundy & Wilcox;* and a reply brief signed by *Frawley, Bundy & Wilcox, C. T. Bundy,* and *H. B. Walmsley,* attorneys, and by *W. P. Bartlett,* of counsel for W. A. Rust and *A. J. Rust,* executors. The oral arguments were by *C. T. Bundy* and *H. B. Walmsley.*

For the respondents there were briefs by *F. M. Miner* and *Fleming & Blum,* attorneys, and *Olin & Butler,* of counsel,

and the cause was argued orally by *J. M. Olin, H. L. Butler,* and *F. M. Miner.*

In support of the motion to dismiss the appeals it was contended, on behalf of the respondents: (1) The appeals should be dismissed because of the insufficiency of the undertakings. There is a separate appeal by each defendant. It is competent for one to separately appeal from a joint judgment against him and others. Stats. 1898, sec. 3048; *In re Luscombe's Will,* 109 Wis. 186, 195. The fact that different notices of appeal are included in the same instrument does not render the appeals any the less several. *Sharon v. Sharon,* 68 Cal. 326, 9 Pac. 187, 192. The notices must be given effect according to their terms—according to their plain intent. *Johnson v. C., M. & St. P. R. Co.* 43 Wis. 431; *Olinger v. Liddle,* 55 Wis. 621; *Wood v. Fisk,* 63 N. Y. 245; *Montgomery v. American Central Ins. Co.* 106 Wis. 543. An appeal is a purely statutory right. *Western U. R. Co. v. Dickson,* 30 Wis. 389, 392; *State ex rel. Andrews v. Oshkosh,* 84 Wis. 548, 556. And statutory regulations with respect to the taking of an appeal must be strictly complied with. 2 Ency. Pl. & Pr. 213. Taking, for instance, the undertaking on behalf of *Gilbert, Thompson,* and Rust, which is the pattern of all the others, it is void for uncertainty. It does not specify to which of the several appeals contained in the notice it relates. *Kelly v. Leachman,* 5 Idaho, 521, 51 Pac. 407; *Wallace v. McKinlay,* 6 Idaho, 95, 53 Pac. 104; *Home & L. Asso. v. Wilkins,* 71 Cal. 626, 12 Pac. 799; *In re Heydenfeldt,* 117 Cal. 551, 51 Pac. 543; *Centerville & K. I. D. Co. v. Bachtold,* 109 Cal. 111, 41 Pac. 813; *Chamberlain v. Sage,* 14 Wis. 193; *White v. Appleton,* 14 Wis. 190. The undertaking is to pay all costs and damages which may be awarded against "said appellants," i. e., those referred to in the notice. The liability of the sureties being *strictissimi juris* (*Drinkwine v. Eau Claire,* 83 Wis. 430), they could only be held liable for damages and costs

awarded against said appellants *jointly*. *Zane v. De Onativia*, 135 Cal. 440, 67 Pac. 685; *Wood v. Fisk*, 63 N. Y. 245. The obligation of the sureties is limited to $250; but the respondents were entitled, under the statute, to undertakings to that amount *on each appeal*. *White v. Appleton*, 14 Wis. 190, 192. (2) The appeals should be dismissed because no notice was given to the defendant corporation. "The adverse party mentioned in the statute is one who has an interest adverse to the reversal of the matter appealed from." *Crowns v. Forest L. Co.* 99 Wis. 103; *Rogers v. Shove*, 98 Wis. 271; *Wheeler v. Hartshorn*, 40 Wis. 83, 96; *Frost v. St. Paul B. & I. Co.* 57 Minn. 325, 59 N. W. 308; *Thompson v. Ellsworth*, 1 Barb. Ch. 627; *Cotes v. Carroll*, 28 How. Pr. 436; *Barnes v. Stoughton*, 6 Hun, 254. The recovery in this action is a corporate asset. The corporation is therefore a necessary party to the action. *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245, 256; *Gager v. Paul*, 111 Wis. 638, 651. Except where the corporation has transferred its interest in the assets to an assignee, in which event the assignee takes the place of the corporation and becomes an indispensable party. *Gores v. Field*, 109 Wis. 408, 415. Failure to serve the statutory notice on any adverse party is fatal to the appeal. *Munk v. Anderson*, 94 Wis. 27; Elliott, App. Proc. § 144; *Hamilton v. Blair*, 23 Oreg. 64, 31 Pac. 197; *Butte Co. v. Boydstun*, 68 Cal. 189, 8 Pac. 835; *Herriman v. Menzies*, 115 Cal. 16, 44 Pac. 660; *Hunderlock v. Dundee M. & T. I. Co.* 88 Ind. 139; *Curten v. Atkinson*, 29 Neb. 612, 46 N. W. 91. As to appeal by corporation whose functions have been suspended by receivership, see *Stolze v. Manitowoc T. Co.* 100 Wis. 208. That if it might appeal it is necessarily an "adverse party" entitled to notice, see *Rogers v. Shove*, 98 Wis. 271. (3) The defects are jurisdictional and not subject to correction. An appeal cannot be perfected after the lapse of the statutory period. Secs. 2831, 3039, Stats. 1898; *Herrick v. Racine W. & D. Co.* 43 Wis. 93; *Munk v.*

Anderson, 94 Wis. 27; Elliott, App. Proc. § 128; *Hall v. Gilman,* 90 Wis. 455. No question is presented here of the omission to perfect an appeal "by mistake or accident" referred to in sec. 3068, Stats. 1898. *Tyson v. Tyson,* 94 Wis. 225, 232. But this statute does not permit an appeal to be perfected after the lapse of the statutory period. *Drinkwine v. Eau Claire,* 83 Wis. 429; *Thompson v. Thompson,* 24 Wis. 517; *Shafer v. Eau Claire,* 105 Wis. 239.

For the appellants, in opposition to the motion to dismiss, it was argued, among other things, that, the notice of appeal having been given, "any other act necessary to perfect the appeal or make it effectual" may be done under the terms of sec. 3068, Stats. 1898. *Johnson v. N. W. Live Stock Ins. Co.* 107 Wis. 337; *Rockman v. Ackerman,* 109 Wis. 639; *Tenney v. Madison,* 99 Wis. 539; *Russell v. Bartlett,* 9 Wis. 556; *Helden v. Helden,* 9 Wis. 557; *Smith v. C. & N. W. R. Co.* 19 Wis. 89; *Ulrich v. Farrington Mfg. Co.* 69 Wis. 213; *Branger v. Buttrick,* 30 Wis. 153; *Gilbank v. Stephenson,* 30 Wis. 155; *Falk v. Goldberg,* 45 Wis. 94; *Grant v. Connecticut M. L. Ins. Co.* 28 Wis. 387; *White v. Polleys,* 20 Wis. 503. The benefit of this curative statute cannot be restricted to the two years after the entry of judgment (1) because the legislature has not said so, and (2) during such two years there is no need of the statute, the right to appeal during that time being absolute. The two years had expired in *Johnson v. N. W. Live Stock Ins. Co.* 107 Wis. 337. The undertaking feature of the statute is not a matter of jurisdiction, and the undertaking may be waived. Sec. 3051, Stats. 1898; 1 Ency. Pl. & Pr. 1000; *In re Luscombe's Will,* 109 Wis. 186, 194. The whole provision as to undertakings for costs is void. The legislature has no power to put any such bar between a litigant and his rights in this court. Const. art. I, sec. 9; Id. art. VII, sec. 3; *Smythe v. Boswell,* 117 Ind. 365, 20 N. E. 263; *Hutts v. Martin,* 131 Ind. 1, 30 N. E. 698. The statute is repugnant also to the federal constitution.

Amendm. XIV; *Williamson v. Liverpool & L. & G. Ins. Co.* 105 Fed. 31; *Yick Wo v. Hopkins,* 118 U. S. 356; *Mutual F. Ins. Co. v. Hammond,* 106 Ky. 386, 51 S. W. 151; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150.

Upon the merits of the appeals counsel for the appellants other than H. H. Hayden argued: (1) The plaintiffs having alleged actual fraud and conspiracy against each of the appellants, they must prove such allegations or the complaint will be dismissed. *Kruschke v. Stefan,* 83 Wis. 373; *Truesdell v. Bourke,* 145 N. Y. 612; *Barnes v. Quigley,* 59 N. Y. 265; *Gallup v. Bernd,* 132 N. Y. 377; *Truesdell v. Sarles,* 104 N. Y. 164; *Carter v. Glass,* 44 Mich. 154; *Mt. Vernon Bank v. Stone,* 2 R. I. 129, 57 Am. Dec. 709; 11 Ency. Pl. & Pr. 895 and notes. (2) In an action brought for actual fraud relief cannot be had by proving a case of constructive fraud. *Eyer v. Potter,* 15 How. 42; *Piper v. Hoard,* 107 N. Y. 67; 11 Ency. Pl. & Pr. 890. (3) The evidence is insufficient to warrant a finding of actual fraud. Fraud must be proved by clear and satisfactory evidence legitimately pointing thereto. 8 Am. & Eng. Ency. of Law, 854; Kerr, Fraud & Mistake, 382; *Greer v. Caldwell,* 14 Ga. 207; *Shaw v. Gilbert,* 111 Wis. 169. (4) The mortgage given to *Gilbert, Thompson,* and Rust on May 18th, 1893, on the Brookville plant, was a valid and subsisting obligation, even if on that day the officers of the company had determined upon a cessation of business. The informal assignment of Jan. 19th, was, in any event, sufficient evidence of an agreement by the corporation, to secure these appellants. Valid security can be given officers and directors of an insolvent corporation at any time, if given pursuant to a valid prior agreement that such security should be given. *Stout v. Yaeger M. Co.* 13 Fed. 802; *Cowen v. P.-G. Co.* 188 Pa. St. 542, 38 Atl. 1075; *Paulding v. Chrome S. Co.* 94 N. Y. 334; *Coats v. Donnell,* 94 N. Y. 168; *Brower v. Brooklyn T. Co.* 21 N. Y. Supp. 324; 5 Thompson, Corp. 5134; *Appeal of*

Neal, 129 Pa. St. 64, 18 Atl. 564; *Young v. Northern Illinois C. & I. Co.* 13 Fed. 806; *Fourth Nat. Bank v. American M. Co.* 11 Sup. Ct. 52, 29 Fed. 611; *Chicago T. & T. Co. v. Smith,* 158 Ill. 417, 41 N. E. 1076; *Clark v. Iselin,* 21 Wall. 360; *Cook v. Tullis,* 18 Wall. 332; *Burdick v. Jackson,* 7 Hun, 488; *Baker v. Harpster,* 42 Kan. 511, 22 Pac. 415; 3 Thompson, Corp. § 4068. The informal assignment of Jan. 19th, 1893, was good in equity as a contract to convey. *Dreutzer v. Lawrence,* 58 Wis. 594. (5) The mortgage of May 18th being valid, the court should either have affirmed the sale of the plant by the receiver to himself, *Gilbert,* and *Thompson,* or set aside such sale and reinstated the mortgage, compelling the said appellants to account for the rents and profits. *Duncomb v. N. Y., H. & N. R. Co.* 84 N. Y. 198. (6) Appellant Frawley, not being an officer, stockholder, or director of the corporation, cannot be held liable in this action. Sec. 3216, Stats. 1898; *Clarke v. Banner & V. P. Co.* 50 Wis. 416. (7) The orders of the court directing the receiver to charge to profit and loss certain amounts, to complete the Bucyrus contract, and other similar orders directing him as to his duty, are administrative in their character, are discretionary, and will not be reviewed by this court. 17 Ency. Pl. & Pr. 881 and cases; *Union Nat. Bank v. Mills,* 103 Wis. 39; *Mercantile T. Co. v. Farmers' L. & T. Co.* 81 Fed. 259. (8) The court and judge making the appointment has the exclusive power to determine the compensation to be paid the receiver, and in doing so can and should consider his personal knowledge of the services rendered and responsibilities assumed. *Union Nat. Bank v. Mills,* 103 Wis. 39; 17 Ency. Pl. & Pr. 878, note, and cases cited. (9, 10) The expenditures of a receiver, made in good faith, for the purpose of reducing to possession, pursuant to the order appointing him, the assets of the corporation, whether encumbered or unencumbered, are properly paid out of any money in his hands at the time of the

final distribution. The marshaling of the funds in the hands of the receiver and apportioning the expenditures incurred by him in the performance of his trust, is for the court and not the receiver. Sec. 3245, Stats. 1898; *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506. (11) If the court erred by allowing the receiver's report as filed, and by allowing to him as credits the expense of collecting hypothecated accounts, such error can be corrected by proper proceeding, and his account surcharged; but it constitutes no sufficient ground to warrant the court in holding that the receiver, his attorneys, and the appellants holding hypothecations were guilty of fraud or dishonesty in the administration of his receivership. *Shaw v. Gilbert,* 111 Wis. 189; *Schwartz v. Keystone O. Co.* 153 Pa. St. 283, 25 Atl. 1018. (12) A receiver who is authorized by the order of appointment to operate a manufacturing plant is thereby authorized to purchase materials, employ labor, and to complete all uncompleted contracts. *Sager Mfg. Co. v. Smith,* 60 N. Y. Supp. 849, 60 N. E. 1120. (13) The allowance made to the receiver and his attorneys in this case was made by the judge making the appointment upon legal rules and was not excessive for the services rendered. *Union Nat. Bank v. Mills,* 103 Wis. 39; *Henry v. Henry,* 103 Ala. 582; *In re Little,* 62 N. Y. Supp. 27, 59 N. E. 1125. (14) The allowance of attorneys' fees is an allowance to the receiver as a disbursement, and such allowance having been paid pursuant to the order of the court, the attorneys receiving it are not liable to the creditors therefor. If improperly allowed, or excessive, such allowance or excess can be charged back to the receiver on a restatement of his account, and he be compelled to account to the creditors for the balance which should be in his hands after all proper credits are allowed him. *Henry v. Henry,* 103 Ala. 583; *Kirker v. Owings,* 98 Fed. 499; *Mills v. Ross,* 57 N. Y. Supp. 680. (15) If a receiver improperly disburses funds belonging to the estate, without authority of the court, he is

liable to the creditors in an action brought by a new receiver, both personally and on his bond. *Mills v. Ross,* 57 N. Y. Supp. 680. (16) No part of the proceeds realized from the sale or collection of encumbered assets can be used to pay the expense of the receivership. All such must be paid out of the general assets. *Moore v. Lincoln Park Co.* 196 Pa. St. 519, 46 Atl. 857; *Lane v. Washington H. Co.* 190 Pa. St. 230; *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506. (17) The creditors of the corporation had a lawful right to file their claim for the full amount, without regard to the security by them held or the amount collected thereon, and to receive their proportion of any dividends declared, based on the full amount of their claim. *Chemical Nat. Bank v. Armstrong,* 59 Fed. 372, and cases; *In re Simpson,* 55 N. Y. Supp. 697; *People v. Remington,* 121 N. Y. 328; *In re Bates,* 118 Ill. 524; *Citizens' Bank v. Patterson,* 78 Ky. 291; *Brown v. Merchant's & F. Nat. Bank,* 79 N. C. 244; *Kellogg v. Miller,* 22 Oreg. 406; *Miller's Estate,* 82 Pa. St. 113; *Third Nat. Bank v. Haug,* 82 Mich. 607. (18) When objections are made to a receiver's account it is proper to order a reference to a master, to hear evidence and report on their correctness. 17 Am. & Eng. Ency. Pl. & Pr. 837. (19) A master's report on a receiver's account does not require confirmation, and does not admit, therefore, of exceptions. 17 Ency. Pl. & Pr. 839; *Cowdrey v. Railroad Co.* 6 Fed. Cas. No. 3293. (20) Where the order of reference does not require the referee to report to the court the facts found, he has no authority to report them, and if he does there is nothing before the court on which to base exceptions. *Royal v. Baer,* 17 Ind. 332. (21) The court erred in consolidating the actions and removing as plaintiff the only judgment creditor of the corporation. None but judgment creditors can maintain such an action. *Hinckley v. Pfister,* 83 Wis. 64. (22) The court erred in vacating the administrative order which fixed the compensation of the receiver and

his attorneys. Such order was exclusively under the control of the judge who administered the trust. *Mercantile T. Co. v. Farmers' L. & T. Co.* 81 Fed. 259; *Union Nat. Bank v. Mills,* 103 Wis. 39; *Olson v. State Bank,* 72 Minn. 320, 75 N. W. 378. (23) D. R. Moon was not shown to be an officer or director of the corporation and sustained no fiduciary relation to it or its creditors, and this cause of action for fraud and conspiracy abated with his death. *John V. Farwell Co. v. Wolf,* 96 Wis. 10; *Lane v. Frawley,* 102 Wis. 373. (24) So, also, the cause of action against R. E. Rust, in so far as the same is based on fraud, conspiracy, or conversion, abated with his death. (25) The demurrer *ore tenus* of all of the appellants should have been sustained as the complaint did not allege that the plaintiffs, or any of them, were judgment creditors of the insolvent corporation, or that an execution had been returned against said corporation unsatisfied. *Hinckley v. Pfister,* 83 Wis. 64. (26) The plaintiffs should not be permitted to recover in this action on account of their laches in failing to appear and file exceptions to the receiver's final account as filed, and by reason of their failure to object to the manner in which the court was administering the trust during the receivership. *Twin-Lick O. Co. v. Marbury,* 91 U. S. 587; *Marsh v. Whitfore,* 83 U. S. 482; *Follansbe v. Kilbreth,* 17 Ill. 522; *Dillingham v. Moran,* 81 Fed. 760. (27) The test of a receiver's action in incurring expense, without the express order of the court, is "Would a man of ordinary business capacity, and prudence, in the conduct of his own business, be likely to incur the same expense?" *Schwartz v. Keystone O. Co.* 153 Pa. St. 253. (28) This court will consider only the competent evidence preserved in the record, and will not consider the unidentified scraps of paper, memoranda, telegrams, etc., received by the trial court. *Lace v. Schoenhalss,* 93 Wis. 665; *Smith v. Perry,* 52 Neb. 738, 73 N. W. 282.

For the appellant H. H. Hayden it was argued, among

other things: (1) There being no controverted questions of fact, and the suit being in equity, the examination in this court must be, as to the matters appealed from, absolutely *de novo;* and no weight whatever is to be allowed to anything found or decided below because *the trial court so found or decided it. Dietz v. Neenah,* 91 Wis. 422, 426; *Candee v. W. U. Tel. Co.* 34 Wis. 471, 483; *Milwaukee Co. v. Pabst,* 70 Wis. 352, 360; *Wheelock v. Tanner,* 39 N. Y. 481, 486; *Farmers' Bank v. Vail,* 21 N. Y. 481, 486; *Southard v. Behrns,* 52 Neb. 486, 72 N. W. 860, 861; *Pratt v. Foote,* 9 N. Y. 463, 465; *U. S. v. Pugh,* 99 U. S. 265, 270; *Draper v. Stouvenel,* 38 N. Y. 219, 223; *Fellows v. Northrup,* 39 N. Y. 117, 119, 120; *Mason v. Lord,* 40 N. Y. 476, 484. (2) Fraud must be proved by clear and satisfactory evidence. 1 Jones, Ev. § 190; *Shaw v. Gilbert,* 111 Wis. 165, 188, 189; *Lavassar v. Washburne,* 50 Wis. 200, 201; 14 Am. & Eng. Ency. of Law (2d ed.) 203. (3) No cause of action arises from a mere showing that a conspiracy has been formed; there must be a showing of *acts* which have *damaged* the plaintiff. *Smith v. Nippert,* 76 Wis. 86, 88; 6 Am. & Eng. Ency. of Law (2d ed.) 873–875. (4) Plaintiffs having made their case upon allegations of actual fraud, if that is not proved, they cannot recover upon any other theory of liability in this action; and defendants are entitled to judgment of dismissal herein. *Kruschke v. Stefan,* 83 Wis. 373, 383; *Truesdell v. Sarles,* 104 N. Y. 164, 167; *Eyre v. Potter,* 15 How. 42, 56; *Piper v. Hoard,* 107 N. Y. 67, 72; *Miller v. King,* 88 Hun, 181, 182. (5) Appellant Frawley, not being an officer or stockholder of the corporation, could not be made a defendant in this action; and this being a statutory action, this objection is a "question of jurisdiction." *Clarke v. Banner & V. P. Co.* 50 Wis. 416, 418; secs. 3216–3228, Stats. 1898. (6) Orders which are purely administrative, and which involve only questions of business judgment or sagacity—of business policy,—will not be dis-

turbed on appeal, and cannot be in any way affected by the fact that they are improvident or prove unprofitable—no abuse of discretion being made to appear. *Mercantile T. Co. v. Farmers' L. & T. Co.* 81 Fed. 254–259; *Weeks v. Weeks,* 106 N. Y. 626; *Wabash, St. L. & P. R. Co. v. Central T. Co.* 22 Fed. 269, where Justice BREWER directed receiver to carry out a bad bargain, made under an order. (7) It is the duty of the receiver, under the court's direction, to reduce to possession, and realize on, all assets, encumbered as well as unencumbered, and to pay the expenses of so doing out of the general fund in his hands. All the money which comes to the receiver's hands is a single fund, which is all equally subject to any payments which the court, or a statute, may order to be made from it. *In re Assignment of Riddell,* 93 Wis. 564, 566; secs. 3217, 3245, Stats. 1898. (8) The amended complaint was insufficient because it failed to allege that any plaintiff was a judgment creditor. *Hinckley v. Pfister,* 83 Wis. 64, 82; sec. 3216, Stats. 1898. (9) The consolidation of two or more suits is within the sound discretion of the court, and leaves each suit entirely separate and distinct, and operates only as a mere *carrying on together* of suits supposed to involve identical issues, in order to expedite the hearing and diminish expense. *Toledo, St. L. & K. C. R. Co. v. Continental T. Co.* 95 Fed. 497, 506; *Hinckley v. Pfister,* 83 Wis. 64, 75, 83; 4 Ency. Pl. & Pr. 695. (10) An order directing the receiver to pay counsel or himself a certain sum of money for services, or a sum to any other person, or to deliver property to any person, is a *final judgment,* and can be re-examined only by an appeal in the regular course or an application for relief within the statutory one year. *In re Commonwealth F. Ins. Co.* 32 Hun, 78; 15 Ency. Pl. & Pr. 317; *Trustees v. Greenough,* 105 U. S. 527; *Stuart v. Boulware,* 133 U. S. 78; *Hovey v. McDonald,* 109 U. S. 150; *Blossom v. M. & C. R. Co.* 1 Wall. 655; *Central R. & B. Co. v. Pettus,* 113 U. S. 121;

Williams v. Morgan, 111 U. S. 684; *Hinckley v. G. C. & S. R. Co.* 94 U. S. 467; *Sage v. Railroad Co.* 96 U. S. 712; *Ex parte Farmers' L. & T. Co.* 129 U. S. 206; *Burnham v. Bowen,* 111 U. S. 776; *Fosdick v. Shall,* 99 U. S. 235; *Forgay v. Conrad,* 6 How. 201; *Simms v. Simms,* 20 Sup. Ct. 58, 61; *Merchants' Bank v. Crysler,* 67 Fed. 388. In each of the foregoing, irrespective of form or phraseology, the supreme court, or circuit court of appeals, looking to the substance, found a *final* judgment or decree; for by statute the appeal to those courts is limited to such. *Drake v. Kochersperger,* 170 U. S. 303; *Butterfield v. Usher,* 91 U. S. 246; *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506; *Union Nat. Bank v. Mills,* 103 Wis. 39; *Leadville C. Co. v. McCreery,* 141 U. S. 475; *Central T. Co. v. Grant,* 135 U. S. 207; *Weeks v. Weeks,* 106 N. Y. 626; *Mercantile T. Co. v. Farmers' L. & T. Co.* 81 Fed. 254. Being final judgments and not being appealed from within two years, nor opened within the statutory one year, they could be attacked, if at all, only by a direct suit in equity to set them aside for fraud. *Farwell v. Great Western T. Co.* 161 Ill. 522, 44 N. E. 891. But this is not a suit of that character. (11) On no possible theory can the judgment stand against either Hayden or Frawley, being solely for money paid them by the receiver to discharge his personal indebtedness to them for legal services rendered to him. Neither the court nor the litigants employ counsel for the receiver. He does this personally, becomes personally bound as an individual for the services, and the court allows him sums *as reimbursement* for such expenses incurred and paid by him. *Stuart v. Boulware,* 133 U. S. 78; Gluck & Becker, Receivers, 361, note, citing *Walsh v. Raymond,* 58 Conn. 251; Id. 355, citing *Tennessee v. E. & K. R. Co.* 4 Baxt. (Tenn.) 92; *Florida C. R. Co. v. Bisbee,* 18 Fla. 60; *Maxwell v. Bank of New Richmond,* 101 Wis. 286, 291. (12) Complainants are barred by laches. *Cutter v. Iowa W. Co.* 96 Fed. 777; Freeman, Judgments,

sec. 142; 15 Ency. Pl. & Pr. 347, notes 4, 5; *Galena & S. W. R. Co. v. Ennor,* 116 Ill. 55. (13) The allowance to the receiver for counsel fees, and for his own services, in lump sums, is the proper method. Compensation for the service of counsel is never a matter of an aggregate of specific items, and bears no analogy to an itemized bill for merchandise. *Greeley v. Prov. S. Bank,* 103 Mo. 212, 17 Ency. Pl. & Pr. 843; *Perry-Mason S. Co. v. Sykes,* 72 Miss. 390, 28 L. R. A. 277; *Stuart v. Boulware,* 133 U. S. 78; *In re Louisiana S. B. & S. D. Co.* 40 La. Ann. 514, 4 So. 301; *Boston S. D. & T. Co. v. Chamberlain,* 66 Fed. 847, 848; *Trustees v. Greenough,* 105 U. S. 527. Counsel and attorney's fees do not consist of items at all. *Tracy v. Stearns,* 61 How. Pr. 265; *Sanford v. Ruckman,* 24 How. Pr. 521; *Eliot v. Lawton,* 7 Allen, 274; *Wilson v. M. & N. W. R. Co.* 31 Minn. 481, 18 N. W. 291, 292. Nor need an attorney to make charges in his books; if he fails to do so, the court fixes the compensation on some reasonable general rule; and may fix it by annual retainer for general services. *Hughes v. Dundee M. & T. I. Co.* 21 Fed. 169. And if charges are made, they are immaterial, for the court fixes the compensation largely upon its own knowledge. *Union Nat. Bank v. Mills,* 103 Wis. 39; *Harrison v. Perea,* 168 U. S. 311; *Olson v. State Bank,* 72 Minn. 320; 17 Ency. Pl. & Pr. 843. And a judge may carry this personal knowledge with him from the circuit and use it in review in the circuit court of appeals. *Boston S. D. & T. Co. v. Chamberlain,* 66 Fed. 847, 848. And the court *may* fix such compensation *entirely* upon personal knowledge, *without hearing any evidence. Fowler v. Equitable T. Co.* 141 U. S. 411; *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506, 523. (14) The compensation allowed the receiver in the court's orders for his own services, and for counsel fees, was no more than was reasonable, and was well inside the authorities. *Schwartz v. Keystone O. Co.* 153 Pa. St. 283, 25 Atl. 1018; *Trustees v. Greenough,* 105

U. S. 527; *Cowdrey v. G., H. & H. R. Co.* 93 U. S. 352, 354; *Union Nat. Bank v. Mills,* 103 U. S. 39. (15) There was no impropriety in Hayden or Frawley conducting litigation for creditors of the corporation, secured by undisputed hypothecations made by the corporation, the receiver *not being a party* to such litigation, and having *an interest* in the enforcement of such claims, because entitled to the excess, if any, of the security, Hayden being paid for such services in full by the creditors, without any claim upon the receiver therefor. 3 Am. & Eng. Ency. of Law (2d ed.) 297, 298; *Shaw v. Bill,* 95 U. S. 10, 14. (16) Valid orders of the court directing its receiver, on its application, may be made without notice, and in this country it is the common practice so to make them. *Weeks v. Weeks,* 106 N. Y. 626. If notice were necessary, it would be presumed, the *contrary* not *expressly appearing upon the record. Falkner v. Guild,* 10 Wis. 563, 573. There is no rule of law or practice forbidding so making such orders without notice. *Merchants' Bank v. Crysler,* 67 Fed. 388. At the worst, if objectionable, it would be only *irregular* or *erroneous. Merchants' Bank v. Crysler,* 67 Fed. 388. And such an objection can be reached only by appeal from the judgment. 11 Am. & Eng. Ency. of Law, 843, 844; *Jackson v. Astor,* Pin. 137, 158; *Tallman v. McCarty,* 11 Wis. 401, 406, 407; *Falkner v. Guild,* 10 Wis. 563, 571; *Amory v. Amory,* 26 Wis. 152, 160; *Gale v. Best,* 20 Wis. 44, 47; *Arnold v. Booth,* 14 Wis. 195. (18) No claim lay against Rust for what he received for allowances for counsel fees, because he paid it over *under orders* of the court; a subsequent reversal or vacation of the order would be immaterial, and would not make the receiver liable. The party objecting must get a *stay* of the order complained of until it can be reviewed. If he neglects to do this, and the receiver pays, the latter is protected. *Florida C. R. Co. v. Bisbee,* 18 Fla. 60; Gluck & Becker, Receivers, 356; *Maxwell v. Bank of New Richmond,* 101 Wis. 286, 288; *Palmer v.*

Truby, 136 Pa. St. 556, 20 Atl. 516; *In re Home P. S. F. Asso.* 129 N. Y. 288, 15 N. Y. Supp. 211, quoted 20 Am. & Eng. Ency. of Law (1st ed.) 119, col. 1. (23) An attack upon a judgment or order for fraud in its making must show that by some trick, device, or otherwise, the court was induced to do something different from what it intended to do, and which it would not have done except for such fraud. *Fisher v. Simon,* 67 Fed. 387; *U. S. ex rel. Fisher v. Williams,* 67 Fed. 384; *Fisher v. Hepburn,* 48 N. Y. 41, 53. (26) A chancellor will decline to act, when what is prayed for amounts substantially to his sitting in review upon another chancellor. *Fisher v. Hepburn,* 48 N. Y. 48, 53; *Winship v. Pitts,* 3 Paige, 259; *Astor v. Ward,* 3 Edw. Ch. 391; *Greenwich Bank v. Loomis,* 2 Sandf. Ch. 76; *In re Livingstone,* 34 N. Y. 577; *Arnold v. Oliver,* 64 How. Pr. 452; *Marvin v. Weider,* 31 Neb. 774, 48 N. W. 825; *Oglesby v. Attrill,* 14 Fed. 214. (27) Fraud that will justify the reexamination of a judgment or order must be some fraud whereby complainant's antagonist in some way prevented him from having an opportunity of obtaining the relief to which he was entitled. *Brooks v. O'Hara,* 8 Fed. 533; *U. S. v. Throckmorton,* 98 U. S. 65; *Greene v. Greene,* 2 Gray, 361. (28) The original written assignment upon the Brookville plant was an equitable mortgage. *Bridgeport E. & I. Co. v. Meader,* 72 Fed. 115, 118. The mortgage related back under the "renewal doctrine." *Chattanooga Nat. Bank v. Rome I. Co.* 102 Fed. 755, 757, 758. (29) This court tries the case on the competent evidence alone. 2 Ency. Pl. & Pr. 474; *Lace v. Schoenhalss,* 93 Wis. 665; *Smith v. Perry,* 52 Neb. 738, 73 N. W. 282, 284.

For the respondents, on the merits, it was contended, *inter alia:* (1) There was no error in the order of March 18, 1898. The statute fully authorized the consolidation of the actions. Sec. 2792, Stats. 1898. The parties had in substance con-

sented. *Eau Claire F. & S. Co. v. Laycock,* 92 Wis. 81. No one was prejudiced thereby. *Lauterbach v. Netzo,* 111 Wis. 322. The court had power to strike out *Barber* and Hayden as plaintiffs. Such power is expressly conferred by our statute, is inherent in courts of equity, and has been frequently exercised. Sec. 2830, Stats. 1898; 1 Ency. Pl. & Pr. 466; Pomeroy, Remedies, sec. 247; *Day v. Buckingham,* 87 Wis. 215; *Hewett v. Adams,* 50 Me. 271; *Hall v. Laver,* 3 Younge & C. 191; *Lloyd v. Makeam,* 6 Ves. Jr. 145; *Durand v. Hutchinson,* 2 Dickens, 456. It is well settled that even a sole plaintiff may be removed and persons having a beneficial interest substituted. *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 502; *Wilson v. Welch,* 157 Mass. 77; *Hamlin v. Baxter,* 20 Kan. 134; *Price v. Wiley,* 19 Tex. 142; *Hubler v. Pullen,* 9 Ind. 273; *Johnson v. Vail,* 14 N. J. Eq. 423; *Pool v. Morris,* 29 Ga. 374; *Jennings v. Springs,* 1 Bailey, Eq. (S. C.) 181; *Winkelman v. Kiser,* 27 Ill. 21; *Silber L. Co. v. Silber,* L. R. 12 Ch. Div. 717; *Plunket v. Joice,* 2 Sch. & Lef. 159. The objection that a plaintiff has not reduced his claim to judgment and attempted to collect under execution, is not jurisdictional, but merely goes to the adequacy of the remedy at law. *State ex rel. Fowler v. Green Lake Co.* 98 Wis. 143, 152. When the order in question was made, the present plaintiffs had no remedy at law, since they had been required to come into the Hayden action, and restrained from proceeding elsewhere. The same practice pursued in this case was sanctioned by this court in *Gager v. Marsden,* 101 Wis. 598; *Wechselberg v. Michelson,* 105 Wis. 452. By changing their position in the litigation the original plaintiffs were in no way aggrieved. *Day v. Buckingham,* 87 Wis. 215. Each and every of the defendants, including Hayden, answered to the merits, without any suggestion of the adequacy of a legal remedy, or of the incompetency of the plaintiffs to maintain the action, and hence effectually waived

any objection which might have been made. There was no error in the provisions of the order of March 18 affecting the interlocutory orders made prior to December 30, 1897. The power of the court to modify or vacate interlocutory orders made at any time before judgment is expressly given by our statute, and is recognized by all the authorities. Sec. 2814, Stats. 1898. Federal decisions, cited by appellants, holding that certain orders would be considered final judgments within the meaning of the appeal statutes are exceptional, and the doctrine of them has been narrowed by the more recent decisions. *McGourkey v. T. & O. C. R. Co.* 146 U. S. 536; *Latta v. Kilbourn,* 150 U. S. 524. None of them presented the question whether *ex parte* orders for the payment of money by the receiver, in the course of the administration proceedings, would be appealable. Even were such orders appealable, they are none the less orders, which may be modified or set aside *pendente lite. Gile v. Colby,* 92 Wis. 619; *Pleasants v. S. R. Co.* 93 Fed. 93. There was no error in that part of the order of March 18 which removed the receiver. The removal by the court of its own officer rests in its sound discretion, and its action is not subject to review. Smith, Receiverships, 565; Gluck & Becker, Receivers (1st ed.) sec. 114, p. 489. That he was an officer of the corporation should have precluded his appointment in the first place, and was sufficient ground for his removal. *McCullough v. Merchants' L. & T. Co.* 29 N. J. Eq. 217; *People v. Third Ave. S. Bank,* 50 How. Pr. 22; *Att'y Gen. v. Bank of Columbia,* 1 Paige, 511; *Bank of Monroe v. Schermerhorn,* 1 Clarke, Ch. 366; *Atkins v. W., St. L. & P. R. Co.* 29 Fed. 161, 173; *Wood v. Oregon D. Co.* 55 Fed. 901; *In re Colvin,* 3 Md. Ch. 278, 302. That he himself had interests adverse to the general creditors, as the holder of preferred claims, should have precluded his appointment, and demanded his removal. 2 Beach, Mod. Eq. Pr. § 749; *McCullough v. Merchants' L. & T. Co.* 29 N. J. Eq. 217;

Schwartz v. Keystone O. Co. 153 Pa. St. 283, 25 Atl. 1018. That, as shown by the records, he had not stood impartially between the unpreferred and the secured creditors, but had aided the latter at the expense of the former to secure the benefit of their securities, demanded his removal. *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506. That his own conduct was to be investigated was sufficient cause for his removal. Gluck & Becker, Receivers (1st ed.) sec. 116, p. 496; *Beach,* Receivers, sec. 796; *McCullough v. Merchants' L. & T. Co.* 29 N. J. Eq. 217. (2) There was no error in overruling the demurrer of the executors of D. R. Moon, deceased. By Moon's answer on the merits all grounds of his demurrer were waived except sufficiency of facts and jurisdiction of court. Sec. 2654, Stats. 1898; *Davis R. L. Co v. Home Ins. Co.* 95 Wis. 542, 547; *Jones v. Foster,* 67 Wis. 296; *Monson v. Lathrop,* 96 Wis. 386; *Phillips v. Carver,* 99 Wis. 561, 572. But one cause of action is stated; hence there was no misjoinder. *Gager v. Marsden,* 101 Wis. 598; *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 443; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 139; *Foster v. Posson,* 105 Wis. 99; *Killen v. Barnes,* 106 Wis. 546; *Adkins v. Loucks,* 107 Wis. 587, 594; *Egaard v. Dahlke,* 109 Wis. 366; *Coddington v. Canaday,* 157 Ind. 243, 61 N. E. 567, 573. That directors, officers, or stockholders will be held liable for the fraudulent appropriation to themselves, or the turning over to others, of the assets of a corporation, when it is insolvent or its officers know or have reason to know that suspension is impending, is well settled. *Ford v. Plankinton Bank,* 87 Wis. 363; *Hinz v. Van Dusen,* 95 Wis. 503; *Rowe v. Leuthold,* 101 Wis. 242; *Slack v. N. W. Nat. Bank,* 103 Wis. 57; *Glenwood Mfg. Co. v. Syme,* 109 Wis. 355, 361. With stronger reason, the appropriation to themselves, or the payment to others, after suspension, of the property of the corporation, to secure their individual obligations, or otherwise, to the prejudice of the general creditors, will render officers, di-

rectors, and stockholders liable. All liabilities of officers, directors, and stockholders, of every nature, so far as they run to the corporation, its creditors, or to any class thereof, and whether based on negligence, wilful wrong-doing, either individually or conspiring among themselves or with others, or even if based upon a penal statute, must be enforced in this exclusive suit. *Hurlbut v. Marshall,* 62 Wis. 590; *Ballin v. Loeb,* 78 Wis. 404; *Ford v. Plankinton Bank,* 87 Wis. 363; *Ballin v. Merchants' Ex. Bank,* 89 Wis. 278; *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230; *Gores v. Day,* 99 Wis. 276; *Gager v. Bank of Edgerton,* 101 Wis. 593, 598; *Foster v. Posson,* 105 Wis. 99, 102; *Cunningham v. Wechselberg,* 105 Wis. 359; *Killen v. Barnes,* 106 Wis. 546; *Gores v. Field,* 109 Wis. 408. Irrespective of the statutes relating to wind-up proceedings, this court has frequently granted relief against conspirators, in actions in equity, and has declared joint and several judgments against them for the damages sustained. *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125; *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481, 498; *Franey v. Warner,* 96 Wis. 222; *Fountain S. P. Co. v. Roberts,* 92 Wis. 345. When, as here, the tortious act benefited the estate of the wrongdoer, the cause of action survived at the common law, always where the suit was in equity, and the same where the suit was at law, unless the form of the action required the plea of not guilty. 21 Ency. Pl. & Pr. 325; *Allen v. Frawley,* 106 Wis. 638; *Cheney v. Gleason,* 125 Mass. 166; *U. S. v. Daniel's Ex'rs,* 6 How. 13; *Head v. Porter,* 70 Fed. 498; *Griswold v. Hilton,* 87 Fed. 256; *People v. Gibbs,* 9 Wend. 30; *Byxbie v. Wood,* 24 N. Y. 607, 609, 612; *Payne's Appeal,* 65 Conn. 397, 32 Atl. 949; *Hench v. Metzer,* 6 S. & R. 272, 273; *Penrod v. Morrison,* 2 Penr. & W. 126, 130; *Hayden v. Vreeland,* 37 N. J. Law, 372, 395; *Shafer v. Grimes,* 23 Iowa, 550; *Baker v. Crandall,* 78 Mo. 584, 47 Am. Rep. 126, 129; *Lee's Adm'r v. Hill,* 87 Va. 497, 12 S. E. 1052; *Garth v. Cotton,* 1 Ves. 524, 3 Atk. 751;

Pulteney v. Warren, 6 Ves. Jr. 73; *Peek v. Turquand,* L. R. 2 Eng. & Ir. App. 325; *Phillips v. Homfray,* L. R. 24 Ch. Div. 439. The rule prevails whether or not any fiduciary relation exists. *Head v. Porter,* 70 Fed. 498. Where one of several defendants jointly proceeded against dies, the action survives against his representatives to the full amount of the plaintiff's property loss, irrespective of the portion which the defendant had received. *Cheney v. Gleason,* 125 Mass. 166. In cases where the wrongdoer was benefited, even the early doctrine of the common law that the action would abate where its form was such as to require the plea of not guilty, was reluctantly followed. *Hambley v. Trott,* 1 Cowp. 375; *Keite v. Boyd,* 16 S. & R. 300. And has been since modified by extending the survivability of the action to all cases where the wrongdoer's estate was benefited, irrespective of the form of the action. *Phillips v. Homfray,* L. R. 24 Ch. Div. 439, 454; *Baker v. Crandall,* 78 Mo. 584, 47 Am. Rep. 126; *Booth's Adm'rs v. Northrup,* 27 Conn. 325; *Lee's Adm'r v. Hill,* 87 Va. 497, 12 S. E. 1052; *Martin's Adm'r v. B. & O. R. Co.* 151 U. S. 673; *Schreiber v. Sharpless,* 110 U. S. 76. The collusive obtaining of the property of the corporation by Moon and his co-pledgees would create, by legal implication, a promise to return the same to the corporation, or to pay to the corporation the value thereof, rendering him and them jointly liable for the value thereof as upon implied contract. *Dow v. Deissner,* 105 Wis. 385, and cases cited. Wherever such legal implication may arise, the action will not abate, whatever its form. For another reason, the cause of action against Moon should be held to survive his death. The receiver Rust occupied a fiduciary relation toward the corporation whose funds were misappropriated. Moon was a stockholder colluding with his co-pledgees who were stockholders, and with the receiver. He thereby assumed a similar relation toward the corporation. The cause of action would be held to survive his death by reason of his fiduciary relation.

21 Ency. Pl. & Pr. 358; *Killen v. Barnes,* 106 Wis. 546, 563; *Wineburgh v. U. S. S. & St. R. Co.* 173 Mass. 60; *Warren v. Para R. S. Co.* 166 Mass. 97; *Concha v. Murrieta,* L. R. 40 Ch. Div. 543; *Bathyany v. Walford,* L. R. 36 Ch. Div. 269; *Stebbins v. Palmer,* 1 Pick. 71. (3) As to the demurrer *ore tenus* of the defendant Frawley, the enforcement of the liabilities charged against the other defendants requires his presence, he having participated in the unlawful acts upon which their liabilities are based. If his liability cannot be worked out herein, and if, as is apparently conceded, theirs may be, it simply results that the receiver or the officer or the stockholder who has unlawfully misappropriated the assets of the corporation must be prosecuted in the wind-up suit, while others, who have acted in collusion with the receiver or the officer or the stockholder, must be prosecuted in a separate suit, even though all are parties to one fraudulent scheme to accomplish the misappropriation, and those who receive the benefit are sought to be charged as trustees, with the defaulting officers, for the benefits they have received. Our statutes and the decisions of this court are clearly against any such unreasonable proposition. Sec. 3237, Stats. 1898; *Hurlbut v. Marshall,* 62 Wis. 590, 606; *Hurlbut v. Tayler,* 62 Wis. 607; *Ballin v. Loeb,* 78 Wis. 404; *Ford v. Plankinton Bank,* 87 Wis. 363; *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230; *Gager v. Marsden,* 101 Wis. 598; *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 443; *Gager v. Paul,* 111 Wis. 638. Where equity may properly assume jurisdiction over a trustee, to hold him to account for his wrongful acts, it will, in the same suit, assume jurisdiction and grant relief as against all those in collusion with him or to whom he may have transferred assets in his hands. 15 Ency. Pl. & Pr. 271; 2 Cook, Corp. § 656; *Peabody v. Flint,* 6 Allen, 52, 57; *Ryan v. L., A. & N. R. Co.* 21 Kan. 365; *Salomons v. Laing,* 12 Beav. 377. Where a trustee—and that the officers or receiver of a suspended corporation are

trustees will not be questioned—diverts the assets of a corporation, all are jointly liable to an accounting in equity therefor, and will be held jointly liable for the fruits of the fraud, irrespective of the amount realized by each. *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 135; *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481, 498; *Franey v. Warner,* 96 Wis. 222; *Fountain S. P. Co. v. Roberts,* 92 Wis. 345. Under a statute like our sec. 3216, providing for the sequestration of the assets of an insolvent corporation, that "sequestration" necessarily involves the making of parties to the action, with the corporation, all persons who have in their possession any corporate assets, and that notwithstanding the joinder of such persons and the assertion of liabilities against them, the complaint will be deemed to state but one cause of action. *Proctor v. Sidney S., B. & F. Co.* 40 N. Y. Supp. 454. (4) There was no error in the judgment against *Gilbert, Thompson,* and the executors of Rust for the proceeds of the sale to them of the Brookville plant. The conclusion of the court that the giving of the mortgage on the plant May 18, 1893, to the three officers and directors named, as security to them for an endorsement theretofore made of the paper of the corporation, the corporation being at the time of the giving of the mortgage, to the knowledge of the officers, hopelessly insolvent, and the closing of its business having already been determined upon, constituted an unlawful preference, is well sustained by the authorities. *Hinz v. Van Dusen,* 95 Wis. 503; *Ford v. Plankinton Bank,* 87 Wis. 363; *Barth v. Koetting,* 99 Wis. 242; *Rowe v. Leuthold,* 101 Wis. 242; *Slack v. N. W. Nat. Bank,* 103 Wis. 57; *Glenwood Mfg. Co. v. Syme,* 109 Wis. 355; *Swift & Co. v. Dyer-V. Co.* 28 Ind. App. 1, 62 N. E. 70; *Bosworth v. Jacksonville Nat. Bank,* 64 Fed. 615; *Lippincott v. Shaw C. Co.* 25 Fed. 577; *Montgomery v. Phillips,* 53 N. J. Eq. 203, 31 Atl. 622; *Savage v. Miller,* 56 N. J. Eq. 432, 39 Atl. 665; *Lowry B. Co. v. Empire L. Co.* 91 Ga. 624, 17 S. E. 968; *Atlas T. Co.*

v. Macon H. Co. 101 Ga. 391, 29 S. E. 27; *Tillson v. Downing,* 45 Neb. 549, 63 N. W. 836; *Slough v. Ponca M. Co.* 54 Neb. 500, 74 N. W. 868; *National W. P. Co. v. Columbia Nat. Bank,* 63 Neb. 234, 88 N. W. 481; *Reynolds v. Smith,* 60 Neb. 197, 82 N. W. 627; *W. P. Noble M. Co. v. Mt. Pleasant E. C. Inst.* 12 Utah, 213, 42 Pac. 869; *Gottlieb v. Miller,* 154 Ill. 44, 39 N. E. 992; *Goodyear R. Co. v. George D. Scott Co.* 96 Ala. 439, 11 So. 370; *U. S. Rubber Co. v. American O. L. Co.* 96 Fed. 891; 2 Cook, Corp. § 693. The claim that such preference was given in pursuance of the assignment of Jan. 18, 1893, and that the assignment was given at a time and under circumstances when the corporation might lawfully prefer its officers, is without merit. The assignment was not witnessed, and was not sealed with the corporate seal. It was a nullity, and conferred no rights whatever. Sec. 2216, Stats. 1898; *Rockwell v. Elkhorn Bank,* 13 Wis. 653, 657; *Galloway v. Hamilton,* 68 Wis. 651; *Marvin v. Anderson,* 111 Wis. 387, 392; 4 Thompson, Corp. § 5060; Angell & Ames, Corp. § 291; 2 Morawetz, Corp. (2d ed.) § 582; *Allen v. Brown,* 6 Kan. App. 704, 50 Pac. 505; *Shropshire v. Behrens,* 77 Tex. 275, 13 S. W. 1043; *Mott v. Danville Seminary,* 129 Ill. 403, 21 N. E. 927, 929; *Danville Seminary v. Mott,* 136 Ill. 289, 28 N. E. 54, 55; *Washington & P. T. Co. v. Cullen,* 8 Serg. & R. 517; *Wheelock v. Moulton,* 15 Vt. 519; *Koehler v. Black R. F. I. Co.* 2 Black, 715, 717; *Dobbins v. Etowah Mfg. Co.* 75 Ga. 238; *Beatty v. Marine Ins. Co.* 2 Johns. 109; *Williams v. C. & H. R. Co.* 5 Eng. L. & Eq. 497, 503. The assignment was made by the president and secretary as officers and directors of the corporation, to themselves personally. Such a deed is, on its face, void even where the statutory requisites of execution have been complied with. *Cook v. Berlin W. M. Co.* 43 Wis. 437; *Haywood v. Lincoln L. Co.* 64 Wis. 639; *Glenwood Mfg. Co. v. Syme,* 109 Wis. 355; *Swift & Co. v. Dyer-V. Co.* 28 Ind. App. 1, 62 N. E. 70. Such a conveyance could only be jus-

tified, if at all, by the clearest evidence of special authority given by the corporation to the officers so to do, independently of their votes or influence, and the onus of showing such authority would rest upon the officers claiming under the assignment. *Ludington v. Patton,* 111 Wis. 208; *Swift & Co. v. Dyer-V. Co.* 28 Ind. App. 1, 62 N. E. 70; *Pitman v. Elmore,* 93 Mo. App. 592, 67 S. W. 946; *Finch Mfg. Co. v. Stirling Co.* 187 Pa. St. 596, 41 Atl. 294. To say that the assignment, though not enforcible, should operate as a promise to give security, is to say that the assignment is not a void thing, as the courts hold, but is valid as an executory contract. *Grant v. Minneapolis B. Co.* 68 Minn. 86, 70 N. W. 868; *Cole v. Dealham,* 13 Iowa, 551. Under the authorities, it would add nothing to the legality of the mortgage of May 18, even if it were given in execution of an agreement made prior to the time when the corporation became insolvent, at least unless the agreement were such that it would be specifically enforced. *Copeland v. Barnes,* 147 Mass. 388; *In re Jackson I. Mfg. Co.* Fed. Cas. No. 7153; *Bank of Leavenworth v. Hunt,* 11 Wall. 394; *In re Thomas Wood,* 5 Fed. 443; *Arnold v. Maynard,* 2 Story, 349, Fed. Cas. No. 561; *Morey v. Millikin,* 86 Me. 464, 30 Atl. 102; *Montgomery v. Phillips,* 53 N. J. Eq. 203, 31 Atl. 622. (5) There was no error in respect of the judgment rendered for expenditures made by the receiver in completing, perfecting, and collecting upon pledged contracts or accounts. The rule is well settled that a receiver should not assume the execution of a contract which is onerous to the estate, or which may result in depleting the assets in his hands, and that so to do is to create an unlawful preference. Smith, Receiverships, § 35; *Scott v. Ranier P. & R. Co.* 13 Wash. 108, 42 Pac. 531; *United E. S. Co. v. Louisiana E. L. Co.* 71 Fed. 615; *General E. Co. v. Whitney,* 74 Fed. 664; *Dushane v. Beall,* 161 U. S. 513; *Southern Ex. Co. v. W. N. C. R. Co.* 99 U. S. 191; *Quincy, M. & P. R. Co. v. Humphreys,* 145 U. S. 82; *St. Joseph &*

St. L. R. Co. v. Humphreys, 145 U. S. 105; *Sun Flower O. Co. v. Wilson,* 142 U. S. 313; *Central T. Co. v. East Tennessee L. Co.* 79 Fed. 19; *Ames v. Union P. R. Co.* 60 Fed. 966; *Union L. & T. Co. v. S. C. M. R. Co.* 49 Fed. 267; *Farmers' L. & T. Co. v. C. F. & Y. V. R. Co.* 73 Fed. 715; *Central T. Co. v. M. & N. G. R. Co.* 51 Fed. 15; *Ellis v. B. H. & E. R. Co.* 107 Mass. 1. But whether the receiver was or was not bound to complete such a contract or to incur expense in realizing upon it, makes no difference in the result. Pledged as it was, if he spent the funds of the estate in completing or realizing upon it, the expenditures were incurred in the creation of a fund for the benefit of the lien holders, and the fund so created should bear the expenses incurred in its creation. *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506, 519, 520; *T. T. Haydock C. Co. v. Pier,* 78 Wis. 579; *Fuller v. Abbe,* 105 Wis. 238. All who actively and fraudulently participated in procuring and receiving the benefit of such expenditures are jointly bound to make good the amounts so diverted to their benefit, irrespective of the extent of the benefit which each may have received. *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481, 498; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 135; *Fountain S. P. Co. v. Roberts,* 92 Wis. 345; *Franey v. Warner,* 96 Wis. 222; *Banner v. Schlesinger,* 109 Mich. 262, 67 N. W. 116. Even if the pledgees were not themselves trustees, and had not actively participated in the procuring of the preference, they would be liable with him for the return of the expenditures made because of their receipt of the benefits arising therefrom with knowledge that the expenditures were made in violation of Rust's duty as trustee. *Wetmore v. Porter,* 92 N. Y. 76, 81; *First Nat. Bank v. Nat. Broadway Bank,* 156 N. Y. 459, 467; *Warren v. Union Bank,* 157 N. Y. 259, 268; *Duncan v. Jaudon,* 15 Wall. 165; *Kitchen v. Bedford,* 13 Wall. 413; *Shaw v. Spencer,* 100 Mass. 382; *Goldthwaite v. Ellison,* 99 Ala. 497, 12 So. 812; *Ludington v. Patton,* 111 Wis. 208,

239, 242; *Lee v. Horton,* 104 N. Y. 538, 541; *Pittsburg M. Co. v. Spooner,* 74 Wis. 307, 320; *French v. Pittsburgh V. & H. Co.* 184 Pa. St. 161, 39 Atl. 63. The making of such expenditures by the trustee, in breach of his trust, and the receipt of the benefit thereof with knowledge, or means of knowledge, that the payments were made in breach of the trust, constitute a joint conversion on the part of him paying and those receiving, rendering all equally liable for the repayment of the amount paid. *Western U. T. Co. v. Franklin C. Co.* 70 N. H. 37, 47 Atl. 616; *Pierson v. McCurdy,* 33 Hun, 520, 100 N. Y. 608; *Kavanaugh v. Taylor,* 2 Ind. App. 502, 28 N. E. 553; *Covington v. Anderson,* 16 Lea, 310; *D. M. Osborne Co. v. Plano Mfg. Co.* 51 Neb. 502, 70 N. W. 1124; *Ryan v. L., A. & N. R. Co.* 21 Kan. 270, 294; *Robertson v. Hunt,* 77 Tex. 321, 14 S. W. 68; *Hill v. Campbell,* 54 Neb. 59, 74 N. W. 388; *Smith v. Briggs,* 64 Wis. 497; *Barth v. Graf,* 101 Wis. 27, 35; 1 Sutherland, Damages (2d ed.) § 140. As to the effect of the orders of the court made in reference to the foregoing matters, it is well settled that a receiver will not be protected in the payment of money, or in other action, by an order of the court obtained in bad faith or in violation of his duty. *Sweet v. Converse,* 88 Mich. 1, 49 N. W. 899; *In re Shea,* 57 Minn. 415, 59 N. W. 494; *Schwartz v. Keystone O. Co.* 153 Pa. St. 283, 25 Atl. 1018; *Matter of Commonwealth F. Ins. Co.* 32 Hun, 78; *People v. Family F. Soc.* 52 N. Y. Supp. 867. Even where such an order is obtained by a receiver upon notice, in good faith, and without breach of his trust, so that it will protect him for expenditures made under it, it will not shield the persons for whose benefit the expenditures are made from liability, if it develops that the order was irregular or improvidently granted. *In re Home P. S. F. Asso.* 15 N. Y. Supp. 211, 129 N. Y. 288; *Palmer v. Truby,* 136 Pa. St. 556, 20 Atl. 516; *Boice v. Conover,* 54 N. J. Eq. 531, 543, 544, 35 Atl. 402. (6) There was no error in the judgment against Hay-

den, Frawley, and the representatives of Rust. That a receiver is not entitled to compensation where he has been guilty of negligence or misconduct, or breach of trust, even where he acts without fraudulent intent, is well settled. *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506; *Davis v. Swedish-Am. Nat. Bank,* 78 Minn. 408, 81 N. W. 210; *Schwartz v. Keystone O. Co.* 153 Pa. St. 283, 25 Atl. 1018. It is equally well settled that trust funds may not be depleted by the payment of compensation to attorneys who have acted in bad faith, or adversely to the interest of the trust, or who represent conflicting interests. *Davis v. Swedish-Am. Nat. Bank,* 78 Minn. 408, 81 N. W. 210; *Speiser v. Merchants' Ex. Bank,* 110 Wis. 506; *T. T. Haydock C. Co. v. Pier,* 78 Wis. 579; *Farwell v. Great Western T. Co.* 161 Ill. 522, 44 N. E. 891, 920; *Strong v. International B. L. & I. U.* 183 Ill. 97, 47 L. R. A. 792; *Vieth v. Ress,* 60 Neb. 52, 82 N. W. 116; *Adams v. Woods,* 8 Cal. 306; *Schwartz v. Keystone O. Co.* 153 Pa. St. 283, 25 Atl. 1018; *In re Clauser's Est.* 84 Pa. St. 51; *Clapp v. Clapp,* 1 N. Y. Supp. 920; *Smith v. Wise,* 132 N. Y. 172; *Perry-Mason S. Co. v. Sykes,* 72 Miss. 390, 28 L. R. A. 277; *Platt v. Archer,* 13 Blatchford, 351. Even were the question one between attorney and client, the attorneys, under the facts of this case, would be precluded from recovering compensation. *Strong v. International B. L. & I. U.* 183 Ill. 97, 47 L. R. A. 792; *Brackett v. Norton,* 4 Conn. 517, 10 Am. Dec. 179. (7) The action would not necessarily fail, even though conspiracy and fraud were not proven. No variance short of an entire failure of proof is material. And if the proof might have been admitted under an amendment to the complaint, the case made by the complaint could not be deemed to be unproved. *Reisz v. Supreme Council,* 103 Wis. 427; *McNally v. McAndrew,* 98 Wis. 62; *Slater v. Cook's Estate,* 93 Wis. 104. In this case there was but one cause of action,—that for closing up the corporation, and, as incidental thereto, compelling an ac-

counting by defendants for the disposition of this property and funds for the benefit of its creditors. *Hurlbut v. Marshall,* 62 Wis. 590, 601; *Gager v. Marsden,* 101 Wis. 598; *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230, 105 Wis. 443. But were the scope of the action merely conspiracy and fraud, there would here be no failure of proof, though it were assumed the evidence established no conspiracy. The gist of the action wherein conspiracy is charged is the damage, and not the conspiracy. *Martens v. Reilly,* 109 Wis. 464. Though the proof of conspiracy fail, recovery may be had against any one or more of the defendants who may have caused the damage. 6 Am. & Eng. Ency. of Law (2d ed.) 872; *Hutchins v. Hutchins,* 7 Hill, 104; *Jones v. Baker,* 7 Cowen, 445; *Parker v. Huntington,* 2 Gray, 124; *Booker v. Puyear,* 27 Neb. 346, 43 N. W. 133; *Van Horn v. Van Horn,* 56 N. J. L. 318, 28 Atl. 669; *Fountain S. P. Co. v. Roberts,* 92 Wis. 345.

The cause was reargued on December 11, 1903.

For the appellants, on the reargument, there was a brief signed by *Frawley, Bundy & Wilcox,* attorneys for W. A. and *A. J. Rust,* as executors, *Lydia A. Frawley,* as executrix, *F. H.* and *S. G. Moon,* as administrators, *J. T. Barber, Fitch Gilbert, George T. Thompson,* and *Chippewa Valley Bank,* and by *W. P. Bartlett,* of counsel for W. A. and *A. J. Rust,* executors; and a separate brief signed by *H. B. Walmsley,* attorney for H. H. Hayden. The cause was argued orally by *C. T. Bundy, H. B. Walmsley,* and *W. P. Bartlett.*

For the respondents there was a brief signed by *F. M. Miner* and *Fleming & Blum,* attorneys, and *Olin & Butler,* of counsel, and oral argument by *J. M. Olin, H. L. Butler,* and *F. M. Miner.*

The following opinion was filed April 19, 1904:

I.

Motions to Dismiss Appeals.

Marshall, J. Many questions are presented for consideration on the motions to dismiss. Perhaps most of them could well be passed without even a mention thereof. It is certain, as will be seen, that those upon which the motions must turn are few in number and simple. However, as others are of interest as practice matters, and distinguished counsel have with great industry briefed all of them, it is considered best to make this opinion a response to each and all which they so seem to regard of sufficient importance to ask it, and have devoted so much professional energy to aid in a right conclusion in respect to being reached.

1. First, we have the question of whether there was a fatal omission as regards complying with sec. 3049, Stats. 1898, because the notices of appeal were not served on the National Electric Manufacturing Company, the insolvent corporation, and in the initiatory proceedings the sole defendant.

Cases here on appeal must necessarily have their appropriate parties, properly brought into court, else jurisdiction cannot exist to do more than dismiss. One of such parties is known in the initiatory proceedings as the adverse party. That does not necessarily include, in a jurisdictional sense, persons on the side of the adverse decision sought by some on that side to have reversed or modified, even if there is an adversity of interest between them (*Hunter v. Bosworth,* 43 Wis. 583); though it is said that one so circumstanced,—whether treated as an adverse party or not, for the purposes of service under the section under consideration,—may have all the rights thereof as regards a hearing on the appeal if he so desires. The adverse party does not necessarily include merely the opposite party appearing upon the record. A per-

son may be an appellant or an adverse party within the meaning of the statute and his name not appear in the litigation resulting in the decision at all. If he has a substantial interest adverse to the decision, that is all that is required for an appellant, whether it be direct or by privity created between himself and the person against whom the decision was rendered by reason of succeeding to his rights after the decision or subsequent to the commencement of the action. *Rogers v. Shove,* 98 Wis. 271, 73 N. W. 989; *Crowns v. Forest L. Co.* 99 Wis. 103, 74 N. W. 546; *Hiscock v. Phelps,* 2 Lans. 106; *Cotes v. Carroll,* 28 How. Pr. 436; *Barnes v. Stoughton,* 6 Hun, 254; *Pickersgill v. Read,* 7 Hun, 636; Baylies, New Trials & Appeals (2d ed.) 145. To determine when the appeal statute is satisfied as to an appellant or a party aggrieved or an adverse party, while, *prima facie,* the original parties on the record may answer, the supreme test is the possession of some substantial interest adverse to the judgment, a revision of which is sought in the appellate court.

We are unable to see how the insolvent corporation,—which, according to the record, exists at best only in name; that has surrendered all its property to the court so far as it is capable of doing so, and in no event, according to the undisputed facts and its own confession, can profit by the judgment; moreover, that has filed a declaration in this court, in effect, that it has no concern at all with what comes of the matter in controversy here,—can be considered an adverse party to the appellants.

It was held in *Gores v. Field,* 109 Wis. 408, 415, 84 N. W. 867, 85 N. W. 411,—an action to recover of the officers of a corporation circumstanced as this one for the benefit of its creditors, property thereof misappropriated by such officers while the corporation was a going concern,—that it was not an interested party in the litigation, required to be joined in the suit under the general rule governing the enforcement of the right of a corporation at the suit of another. It would

seem to follow logically that, in a sequestration suit under the statutes, after the same has passed the stage rendering the presence of the insolvent necessary in order that its liabilities may be adjudicated and the assets under its control taken into the custody of the court, the corporation is not an adverse party as to its creditors in further proceedings in the litigation to secure the honest application of the trust property—that in the possession of the court and that misapplied, if any, by its officers before suit brought—to the payment of its indebtedness. If that be so, then the insolvent corporation here is not an indispensable party to the appeals. In the case cited it was said that the corporation was as far removed from pecuniary injury as if it were legally dissolved. The situation here is stronger yet. The corporation is dead for all purposes except the settlement of its affairs. The purpose of the suit is to wind it up, in a business sense, and the judgment of this court practically has that effect. It is really, for all practical purposes, as though it never was. It can neither injure nor be injured. It has nothing to render up, and that which the pending litigation seeks to obtain can never reach its treasury. Strictly speaking it has no treasury, even though it has a sort of existence for the purpose of the settlement of its affairs, since all it had, including that unlawfully parted with by its officers, if any, before the commencement of this action, and that surrendered by it and subsequently dissipated by those called upon to administer the same, if any there be, reachable in this litigation, constitutes a trust fund for its creditors. It is their sole property by the undisputed facts, since at the very best it will pay but a small percentage of the corporate liabilities. The corporation cannot in any sense be considered even a remote *cestui que trust*. It needs no further argument to show that it is as far removed from the status of one having a substantial interest in the judgment in favor of its creditors, now sought to be impeached, as one can imagine.

It may be stated as a rule of practice, deducible from the foregoing, that in an action under sec. 3216, Stats. 1898, and its associate sections, to sequestrate and distribute the assets of an insolvent corporation, when the sequestration shall have been fully accomplished and the liabilities fully ascertained, rendering it certain that under no circumstances will the assets discharge the same, in subsequent proceedings in the litigation in respect to realizing upon the trust fund by the creditors,—whether against unfaithful administrators thereof in the suit causing a diminution of the same, or guilty participants with them, or against officers of the corporation or guilty participants with them in misapplying the corporate assets after the status of the same shall have been fixed as a trust fund for the benefit of its creditors,—the corporation is not an interested party adverse to either party to the litigation under the appeal statute.

2. The next proposition for consideration has to do with the character of the appeals as regards whether they are single or joint. We see no escaping from the position of respondents' counsel that the parties in each notice of appeal did not intend thereby to take one appeal, but purposed that each in his own behalf should appeal. To that end they gave each notice the effect of as many notices as there were parties appellant mentioned therein, and the service thereof the effect of an attempt to institute an independent appeal for each of such parties. Notwithstanding the ingenious argument of able counsel to the contrary, there can be, it seems, no misunderstanding the meaning of these words, which are a fair sample of what is contained in all of the notices: "*Fitch Gilbert* and *John S. Owen* severally and separately appeal." They mean, if they mean anything, that each, independent of the other, invokes the jurisdiction of the appellate court. The bond as to each notice is clearly inconsistent therewith. It is a single obligation for $250. The premise, preceding the obligatory clause, uses language as regards the occasion there-

of, appropriate only to a joint appeal and a single undertaking. "The above named appellants intend to appeal," etc. Such clause is in perfect harmony therewith: "Appellants will pay all damages that may be awarded against the appellants, not exceeding $250." So, while we have numerous groups of persons, each person with a separate appeal, there are only as many undertakings as groups. That does not satisfy the calls of sec. 3052, condemning every appeal as "ineffectual for any purpose" unless an "undertaking be executed on the part of the appelant by at least two sureties," to the effect that "the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding $250."

Counsel for appellants advance the idea that a proper construction of a single undertaking, in form to answer for the default of several persons, is that it is one to answer for the default of each, hence a several undertaking, thus satisfying the statute, citing *Vandyke v. Weil,* 18 Wis. 277. We are unable to see that the doctrine of that and similar cases applies here. It is to the effect that a single undertaking for a single appeal by several appealing jointly, is an obligation to answer for the amount specified therein for all of the defaults, whether joint or several, as regards the matters to secure which the undertaking is given. That is quite familiar, but it comes far short of holding that when two persons appeal separately, either by independent notices or joining in one notice so worded as to give it the effect of two, and give one undertaking appropriate to a single appeal, such undertaking can by construction be held to be two, each for $250, and thus satisfy the calls of the statute. An obligation to the extent of $250 for the defaults, joint or several, of a number of persons acting jointly of course satisfies the statute. It would hardly seem that rules for construction would be required to discover that, though the early decision seems to have been reached by the aid thereof. But there is no way by which one

undertaking for $250 can be turned into several such, without plainly violating the statute.

3. Next it is contended on the part of respondents' counsel that though the notice of appeal was served as required by sec. 3049, and the record transmitted to this court, no jurisdiction was obtained here for any purpose whatever; and that the defect is not remediable. On the other hand appellants' counsel just as confidently contend that the failure to execute the bonds required, or to serve the same as the statute provides, does not militate against jurisdiction having been conferred here for some purposes, citing in support of that, *Helden v. Helden,* 9 Wis. 557; *Russell v. Bartlett,* 9 Wis. 556; *Smith v. C. & N. W. R. Co.* 19 Wis. 89; *White v. Polleys,* 20 Wis. 503; *Grant v. Connecticut M. L. Ins. Co.* 28 Wis. 387; *Branger v. Buttrick,* 30 Wis. 153; *Ulrich v. Farrington Mfg. Co.* 69 Wis. 213, 34 N. W. 89. The effect of those cases is that the mere taking of an appeal by the service of a proper notice and sending the record here does not give the court such jurisdiction as to enable it to hear the cause, but does give it the necessary jurisdiction to enable it to permit the appeal to be perfected by the service of a proper bond, or cure any other defect in the proceedings within the period limited by statute for appealing; and that, if the proper undertaking is executed and filed, but not properly served, the court acquires such jurisdiction as to enable it to hear and decide the cause, the adverse party not seasonably objecting, failure in that regard being deemed a waiver of such service or an estoppel as regards suggesting such failure with effect. In that the court, as will be seen, gave force to the statute in all substantial essentials. Sec. 3052 says that: "To render an appeal effectual for any purpose an undertaking must be executed," etc. That suggests at once that an appeal may have an existence before the execution of the undertaking, though not for all purposes. The term "any purpose" clearly includes the duty of the clerk below to certify

up the record, and proceedings here as regards a hearing of the cause. The clerk has no right to act in the matter till he can accompany the papers with some semblance, at least, of a proper undertaking under sec. 3052. That is the effect of sec. 3050. That the former section means as indicated must be the case to render it harmonious with sec. 3049, to the effect that any appeal will be deemed "taken by the service of the notice of appeal and perfected on the service of the undertaking for costs, or the deposit of money instead, or the waiver thereof as hereinafter prescribed." The waiver mentioned is required to be in writing. Sec. 3051. Consistent with the meaning we attribute to secs. 3049, 3050, and 3052, we have sec. 3068, providing that:

"When a party shall in good faith give notice of appeal and shall omit, through mistake or accident, to do any other act necessary to perfect the appeal or make it effectual or to stay proceedings, the court from which the appeal is taken or the presiding judge thereof, or the supreme court or one of the justices thereof, may permit an amendment or the proper act to be done, on such terms as may be just."

So, as said in *Grant v. Connecticut M. L. Ins. Co.* 28 Wis. 387, when a notice of appeal is duly served in good faith, jurisdiction is at once conferred upon this court as well as the trial court for some purpose, i. e., that of permitting the appeal to be perfected so that it can be heard. Such jurisdiction is not ordinarily exercised here in advance of the transmission of the record hereto, though it may be, and should be when necessary to prevent a miscarriage of justice. Obviously, this court could not proceed to hear a cause upon appeal without compliance with sec. 3052. To do so would be to act in defiance of the statute as regards a right wholly statutory. *White v. Polleys,* 20 Wis. 503, does not go so far as to decide to the contrary of this. It is only to the effect that, if the bond is executed in compliance with such section and duly transmitted to this court for the benefit of the adverse party, the cause may proceed to judgment unless such

adverse party seasonably objects. That is, the party may waive the service of the undertaking, but not the execution thereof and filing the same in the record. The rule obviously cannot apply to this case in any event, since, as we have seen, sec. 3052 was not complied with at all, since it cannot be said that the giving of one undertaking in the sum of $250, covering several appeals, is the giving of a separate undertaking in that sum for each of such appeals.

4. Next counsel for appellants challenge the power of the legislature to require security for costs as a condition of invoking the jurisdiction of this court. They refer to the constitutional provision conferring appellate jurisdiction here, and also that part of the bill of rights adopted from Magna Carta, providing that, "Every person ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay." Such statutes as those under consideration have existed in the face of similar constitutional provisions for a hundred years or more. Courts exercised authority of a like nature theretofore, though fenced about by Magna Carta. The subject has had the attention of this and other courts, and the law in respect to it has been so thoroughly settled that any lengthy discussion thereof anew would seem quite out of place were it not for the confidence with which the matter is now pressed upon our attention and the fact that this is the second time in recent years that the subject has been presented to this court.

True, appellate jurisdiction conferred here, within the meaning of the constitution, cannot be restricted by legislative authority, but such jurisdiction has regard to that exercised before the constitution was adopted, not to remedies by appeal, which are purely legislative creations. The permission to use the machinery of this court as to such a right being purely statutory, it is competent for the legislature to prescribe such conditions in respect thereto as it sees fit, the same as it is for it to withhold the right altogether, leaving

litigants solely to their common-law remedies. *Western U. R. Co. v. Dickson,* 30 Wis. 389; *Gianella v. Bigelow,* 92 Wis. 267, 65 N. W. 1030. The law in that regard was very tersely stated by Mr. Justice RYAN in the first case cited, this language being used: "An appeal is purely a statutory remedy, and unless given by statute the right does not exist." The idea is this: The hearing of an appeal given by statute is within the constitutional jurisdiction of this court; the creation of a right to a particular method of bringing about a review here, of the decision of the lower court, is within the constitutional authority of the legislature. To invoke the jurisdiction of this court, which exists by constitutional grant, is one thing; the remedy by which it is accomplished is another. The only constitutional remedies guaranteed are those specially preserved, exercisable by common-law writs in their appropriate spheres.

For authorities to the effect that courts were never deemed controlled by Magna Carta as to requiring security for costs, either in law or equity, we refer to *Bradwell v. Weeks,* 1 Johns. Ch. 325; *Mayer v. Tyson,* 1 Bland (Md.) 559; *Swift v. Collins,* 1 Denio, 659; *Dyer v. Dunivan,* 3 How. Pr. 135; *People ex rel. Fuller v. Oneida Common Pleas,* 18 Wend. 652; 1 Dan. Ch. Pr. 35; 3 Bla. Com. 399. The question of whether the constitution has changed that was discussed and decided in the negative in the recent case of *Christianson v. Pioneer F. Co.* 101 Wis. 343, 77 N. W. 174, 917. For examples that other courts that have spoken on the subject are in harmony therewith, see *Nease v. Capepart,* 15 W. Va. 299; *Haney v. Marshall,* 9 Md. 194; *Holt v. T. & R. R. Co.* 81 Md. 219, 31 Atl. 809; *Gesford v. Critzer,* 7 Ill. 698.

As explained in *Christianson v. Pioneer F. Co.,* the provision of our bill of rights, taken from Magna Carta, means no more than it formerly did. It grants no new right, but guarantees one existing at common law. Therefore, when we take the measure thereof by common-law rules, we have its

constitutional scope. The burdens which the Magna Carta provision was designed to lift and secure immunity from, bear no resemblance whatever to those legitimate expenses of litigation which we call costs, or security for the payment thereof, to the prevailing party. They were those exactions, common once, when standards of official conduct, as regards judicial administration, were so incomparably lower than in modern times that we can hardly appreciate how they could ever have been deemed justifiable, as they doubtless were. They were bribes, so to speak, demanded and received by officers exercising judicial power in the king's courts, in the nature of consideration for the use of judicial machinery. In effect, justice was to some extent a matter of bargain and sale. The exactions were not to pay for any legitimate expense, but went to enrich the judicial head, or some one acting thereunder and by his authority. Strange as it may seem, that practice was not deemed to involve any moral turpitude. It was supposed to be to such a degree attributable to sovereign prerogative that the uprooting thereof was accomplished only by a formal relinquishment by the sovereign and a grant to the people, the form thereof being this: "We will not sell the right and justice to any one, nor will we refuse it, or put it off." Sir Edward Coke's explanation of the scope of that pledge would seem to have given rise to the phrasing of the idea as we now find it in our own and other constitutions:

"The king, in the judgment of the law, is ever present and repeating in all his courts, '*Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*' (We neither sell nor deny, nor delay, to any person, equity or justice), and therefore every subject, for injury done him '*in bonis, in terris, vel persona*' (in person, goods, or body) by any other subject, be he ecclesiastical or temporal, without any exceptions, may take his remedy by the course of the law and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay."

In construing any provision of the bill of rights taken from the English Charter, it must not be forgotten that no new restriction was intended thereby, but that the sole purpose thereof was to preserve those valuable safeguards against excessive use of sovereign authority that had become a distinguishing characteristic of English liberty. That idea cannot be found better stated than by COOLEY, J., in *Weimer v. Bunbury,* 30 Mich. 201, 214:

"The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation."

It is suggested, as conclusive evidence that the right to use judicial remedies under the common-law system was free and that the provision of our bill of rights referred to was designed to prevent conditions thereof being created here, that appeals in England were always allowed, even to the House of Lords, without any burdens being imposed on the appellant. A more careful examination of the subject would have shown that the right to impose reasonable conditions as to costs and security for costs was never questioned in the English courts. Special favors, it is true, were granted to persons in need thereof, to sue *in forma pauperis,* upon proof being made that otherwise justice would be denied (1 Dan. Ch. Pr. [6th Am. ed.] 38, 155); but generally, costs and security for costs, in some form, in personal actions, were exacted, after the days of Magna Carta. At first the system was somewhat after the course of the old mischievous custom, though shorn of the real wickedness thereof, since the exactions were required as amercements in the nature of revenue for the sovereign. The imposition went against the losing

party as a penalty: in the case of the plaintiff for unjustly bringing the defendant into court; and in the case of the defendant for unreasonably resisting the plaintiff's demand. 3 Bla. Com. 399. Later by legislation costs were given the plaintiff, when a prevailing party, but not to the defendant under the same circumstances. 6 Edw. I, c. 1. Subsequently the same privilege was extended to defendants. 23 Hen. VIII, c. 15. Soon amercements for the enrichment of the sovereign treasury were abolished. 24 Hen. VIII, c. 8. Laws providing for security for costs naturally followed. By the statutes of 3 Jac. I, c. 8, and 3 Car. I, c. 4, § 4, it was provided that in personal actions, with few exceptions to fit particular cases: "No writ of error should be allowed, unless the party bringing the same, with two sufficient sureties, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court, in double the sum to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the writ of error non prossed, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of the execution." 3 Bla. Com. 411, note. Long before the separation of this country from England Blackstone said in giving the state of the law as it then existed:

"If a writ of error be brought . . . after verdict, he that brings the writ or that is plaintiff in error, must find substantial pledges of prosecution, or bail: to prevent delays by frivolous pretences to appeal; and for securing payment of costs and damages, which are now payable by the vanquished party in all, except in a few particular instances, by virtue of the several statutes."

Thus it will be seen that substantially every element in our statutes as to costs and security for the payment thereof, is found in the laws of England as they existed before the Revolution, and that it was never supposed there was anything in

Magna Carta inconsistent therewith. By gradual approaches, so to speak, the doctrine of the civil law in its entirety was reached and engrafted upon the English system: "*Victus, victori in expensis condemnandus est,*"—the vanquished is to be condemned in costs to the conqueror. We inherited the principle thereof as part of the common law. In some form it has found a place in the code of every state of the Union that has followed common-law ideas, notwithstanding the adoption at the same time, in the constitutions of such states, of the essential principles of Magna Carta.

We often see it stated that costs are a creature of the statute; that costs were not given at common law. *Wisconsin C. R. Co. v. Kneale,* 79 Wis. 89, 95 N. W. 248; Parsons, Costs, § 1. That is liable to be misunderstood by not considering that the common law of England is not synonymous with the common law of this country. The former does not include the English statutes. As the only way costs were imposed before such statutes was by amercements for the benefit of the king, or possibly an addition to the verdict or the judgment of the jury (5 Ency. Pl. & Pr. 108), it is right to say costs were not allowed by the common law of England. But the principles of the English statutes amending the common law and existing at the time of our Revolution, suitable to our condition and in harmony with our constitution and statutes, are a part of the common law of this country. *Coburn v. Harvey,* 18 Wis. 147; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223. As only the principle of the English statutes as to costs and security for costs has been regarded as thus made a part of the common law of this country, the idea that costs are regulated wholly by statute is of course true. *Nash v. Meggett,* 89 Wis. 486, 494, 61 N. W. 283.

In harmony with the law as stated, the writ of error, commonly known as the writ of right, which our constitution so carefully preserved, providing that it shall never be prohib-

ited (sec. 21, art. I), has uniformly been held to be subject to reasonable regulations, including the imposition of security for costs. 7 Ency. Pl. & Pr. 827. In *Ripley v. Morris,* 7 Ill. 381, a general statute requiring the filing of security for costs in civil actions was held to apply to one commenced by writ of error. Our statute, sec. 3054, Stats. 1898, requiring security for costs when a cause is removed on writ of error to this court the same as in case of a statutory appeal, was sustained in *Lombard v. Cowham,* 34 Wis. 300, as a reasonable regulation of the use of the writ. That, it was said, was permissible before the constitution was adopted, and the term therein respecting the writ is to be construed with reference to the conditions then existing.

The foregoing quite extended discussion of the validity of statutes on the subject of costs, and the incidents thereof, though going no further than to respond to the different phases of counsel's argument, is probably unnecessary; yet it will be helpful if it shall prove efficient to guard against a recurrence of the subject being presented to this court for consideration. The treatment of the matter in *Christianson v. Pioneer F. Co.* 101 Wis. 343, 77 N. W. 174, 917, it was thought would finally close the matter here; but such, it is seen, has not been the case.

5. The next proposition submitted as fatal to the motion to dismiss is that sec. 3052, Stats. 1898, is class legislation, hence contrary to the spirit of our constitution and the fourteenth amendment to the national constitution, prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws. The authorities relied on in support of that are *Williamson v. Liverpool, L. & G. Ins. Co.* 105 Fed. 31; *Yick Wo v. Hopkins,* 118 U. S. 356, 6 Sup. Ct. 1064; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 17 Sup. Ct. 255; *Mut. F. Ins. Co. v. Hammond,* 106 Ky. 386, 51 S. W. 151. All of those cases, if we understand them, support the opposite view to the one advocated by coun-

sel. They deal with enactments arbitrarily creating classes and imposing upon members of one burdens not borne by persons generally. The idea that a law which applies to all alike, as does the one in question, is such an enactment merely because the circumstances of particular members of the community may be such that the burden of complying therewith is harder for them to bear than for others, has no support in the authorities nor in the principle of equality before the law, which is the fundamental idea of our system of government. The fact that one person may be poor and another rich is something that the law does not take note of, necessarily. It is for all alike, regardless of wealth or station.

6. Counsel for appellants contend that, if there be not an effective answer to respondents' motion in any of the points heretofore discussed, the supplemental return to this court—showing that before the motions to dismiss were heard due application was made to the court below for leave to perfect the appeals by filing there an undertaking under sec. 3052 as to each of them, regarding every appellant as standing independently of all others, the granting of such application, the execution of an instrument intended to accomplish that purpose, the service thereof as required by sec. 3049, and the return of the same to this court as required by sec. 3050—cures the defect claimed and renders the appeals perfected for all purposes. That the practice, in any view of the matter, was correct, is sufficiently indicated by what has been said; but it is very clearly shown in *Tyson v. Tyson,* 94 Wis. 225, 68 N. W. 1015. If a failure to give a proper undertaking in the first instance were to be classed as an excusable mistake or accident, then it was in the power of the court below to allow the omitted act to be done, as it did, under sec. 3068. If such failure cannot be so classed, but the omission was excusable in any view of the matter, then it is proper for this court to allow the supplemental return with effect, if the new undertaking be sufficient in form, and to deny the

motions to dismiss with or without terms according as justice, under all the circumstances, would seem to demand. The cases cited in the early part of this opinion amply demonstrate that. Our examination of the new instrument leads to the conclusion that it is in legal effect an obligation in the sum of $250 as to each appellant; that is, it is equivalent to as many undertakings of $250 each as there are appeals, regarding the number thereof to be equal to the number of appellants. In that view, we see no reason why the fact that there is but one instrument for all, instead of one for each appellant, should militate against its efficiency as complying with the statute.

Ordinarily the practice in such cases is to allow the appeal to be perfected in the manner sought here upon terms, but exceptional circumstances may justify or demand that no terms be imposed, as was the case in *Tyson v. Tyson*. Here there can be no doubt that appellants' counsel acted in the best of faith in serving the first undertakings. They erred in a matter of judgment. Had their attention been seasonably called to such error it would probably have been corrected without the labor the matter has given to the attorneys on both sides and to this court. It appears that the first undertakings were served on respondents' counsel December 6, 1900. For nearly two years thereafter they treated the case as properly in this court for a hearing when reached in its order; and the rules in regard to the service of cases and briefs were satisfied. In the meantime several stipulations were made with appellants' attorneys in respect to the case, in effect conceding full jurisdiction here. The cause was continued on stipulation twice, on one of which occasions the writing required appellants' attorneys to pay respondents' attorneys the sum of $100. True, the record shows payment of a less sum, which was probably according to some supplementary agreement, but the effect is the same. Several supplemental returns were made. One motion was

made by respondents' attorneys to dismiss the appeals for want of prosecution, which was disposed of upon the theory that the case was here for all purposes. Not till the September term of court for 1902, the fourth term after the first return was filed here, and not till the case was about to be set down for argument, was the defect in the appeals called to the attention of the court or counsel on the other side by the making of these motions. Moreover, there is no showing in the moving papers why the motions were not made at an earlier date. Nothing said, of course, militates against the right to make the motions, to secure the benefit of a proper bond and to raise the judicial question; but the situation shows fault upon the part of respondents' attorneys in not moving in the matter at a much earlier day. It would seem that, if there could be a case justifying the withholding of terms for granting the favor to appellants' attorneys of allowing the supplemental return to stand as effective for the purposes intended, even if the granting of the application in the court below does not remove the matter beyond the discretionary power of this court—which it probably does if the difficulty to be remedied falls under sec. 3068—other than that the favor shall not cause delay in the final disposition of the case, this is one. That has been submitted to. It is therefore considered that the supplemental return fully perfects the appeals, and that the motion to dismiss the same should be denied without costs; and it is so ordered.

II.

Jurisdiction of the Trial Court.

An important subject remains to be considered before reaching a point where the merits of the appeals can be examined. All questions pertaining to the jurisdiction of this court to entertain the appeals being settled favorably thereto, except for an incidental statement in the original briefs of

counsel, the next subject calling for consideration, so far as counsel are concerned, would be the alleged errors of the trial court in the exercise of its jurisdiction. Quite independently of such incidental suggestion, serious doubt arose during our deliberations as to the right of the circuit court, under any circumstances, to entertain a suit of the nature of this one, as presented by the supplemental bill. That concerns, of course, the jurisdiction of such court of the subject of the action, and was not waived by going to trial upon the merits. It seems, respecting the principal defendants at least, that the point was not urged below, if suggested, nor presented by counsel here at first in a way to call the attention of the court to the matter as one likely to be vital to the case.

A challenge to the jurisdiction of the trial court of the subject matter of the action is proper at any time; and, without the question being urged by counsel. It is not only proper for this court, but it is its duty, to make all investigations necessary to satisfy itself in regard thereto with reasonable certainty. *Pollard v. Wegener,* 13 Wis. 569; *Damp v. Dane,* 29 Wis. 419; *Butler v. Wagner,* 35 Wis. 54; *Mathie v. McIntosh,* 40 Wis. 120; *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *In re Klein,* 95 Wis. 246, 70 N. W. 64; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304; 12 Ency. Pl. & Pr. 187, 190:

"When it appears that the court has no jurisdiction over the subject matter of the suit, it will take notice of the defect whether objection is made or not, and will dismiss or stay proceedings *ex mero motu,* and it is its duty to do so without determining any other matter involved in the litigation."

The instances are very rare where any court has ventured to invade the salutary doctrine above stated for the purpose of saving a party from consequences, however severe. It would be difficult to assign any justification for such an invasion that

would leave it free from condemnation as being an act of usurpation, since it goes to the question of power. A court is all-powerful within its jurisdiction, but is absolutely powerless in any legitimate sense when acting outside thereof. Notwithstanding that limitation upon the judicial function which cannot be passed without entering the field of usurpation, and the duty of the judiciary to set, most significantly, an example of submission to law, the call for vindication of right from a plane seemingly beyond the legitimate realms of law, in the strict sense of the term, a plane of mere moral obligation, has sometimes been too strong, it is feared, to be resisted; and in the endeavor to respond thereto, jurisdictional boundaries have been overstepped, actually or in effect (*Boone's Adm'r v. Shackleford's Adm'r,* 66 Mo. 493)—the court seeking to justify it upon grounds of estoppel *in pais,* or some other,—preventing the party against whom relief is granted from being heard to raise the jurisdictional question. It is doubtful whether a court would be justified under any circumstances in assuming jurisdiction of a subject matter which neither the law gives nor the parties could bestow by consent, by either neglect or refusal to take its bearings in that regard, by the limitations upon its power set by the organic act by which it was created.

With the views above expressed, notwithstanding, as indicated, it seemed that there was practical submission to the power of the trial court in this case by appellants, when the appeals were taken up for decision, after a full argument thereof upon the merits, we were confronted at the threshold of our deliberations by the necessity to determine whether such court had not gone so far in an attempt to do justice as to transgress its jurisdiction. Doubts in that regard became so serious that it seemed that counsel for the respective parties should have a full opportunity to aid the court to the best of their ability in reaching a right conclusion, and to

that end this question was formulated, definitely covering the subject, and a reargument thereon ordered:

"The property of an insolvent corporation having been placed under the control of a receiver appointed by the court in a winding-up suit, and it being claimed that such receiver, in the course of his administration, has wrongfully lost such property or some portion thereof, his attorneys and others participating in the wrong; is it competent for the court to make the alleged guilty parties defendants in the pending suit with some creditor, or creditors, standing for all persons so circumstanced, as plaintiff or plaintiffs, broaden out the complaint so as to cover the new matters by a supplemental bill, litigate the same, and include in the general decree in such suit recoveries against all of such alleged guilty parties according to the nature or extent of their liabilities?"

The eminent counsel upon both sides responded to the order for a hearing upon such question by elaborate, learned, and helpful arguments covering a wide range of principles deemed by them to aid in or control its solution. We have endeavored not to pass over one of the learned counsel's suggestions without devoting thereto that careful study which in any reasonable view of the matter it seemed to require to enable us, in the end, to arrive at a just conclusion, all the time being taken for that purpose which seemed necessary or could be used to any appreciable advantage. We shall not undertake to embody in this opinion all of the counsel's points in detail with the reasons for our conclusions in respect thereto, but we will endeavor to treat all specially, not involved in and answered by the declaration of some general principles.

Some observations at the outset seem proper in view of the broad field covered by the arguments of counsel and the court's study of the subject, respecting the scope of the jurisdiction of the circuit courts; not with the idea of declaring anything new, but that we may have a perspective, so to speak, before the mental vision as we proceed, of the vast

extent to which such jurisdiction extends in weighing out justice between man and man. We shall see that, standing where we will and looking where we may, judicial power is present to prevent and redress wrongs. We take a view to the very horizon of our mental perception within the scope of human capacity to violate obligations other than those of a purely moral nature, and the jurisdiction of our circuit courts, except as specially restricted by statute within legislative power to do so or by the constitution itself—those exceptions not, however, affecting the matter in hand—is found to occupy the whole field with instrumentalities designed, and as well adapted as human wisdom has been capable of making them, to execute its function to completeness. Such court, subject to the exceptions suggested, has original jurisdiction in all matters, civil and criminal, within the state, together with appellate jurisdiction from all inferior courts, with power to use all writs necessary to carry into effect its orders, judgments, or decrees (Const. art. VII, sec. 8), a jurisdiction early declared by this court to be "greater, probably, than was ever before our time, in a free government, delegated to one tribunal: the united powers of the English King's Bench, Common Pleas, Exchequer, and Chancery." How vast that is in its chancery field can best be appreciated by applying thereto the standard of measurement which the distinguished men who have been significant in the development of our system have taught us must be used to span it: "Equity will not suffer a wrong to go without a remedy." The term "wrong" in the maxim, as before indicated, has here a significance which does not reach violations of mere moral rights. Any other wrong is said to involve a corresponding primary legal or equitable right, with an equitable or legal remedy, according to circumstances, for the former, and an equitable remedy for the latter. Pomeroy, Eq. Jur. 424.

In the foregoing the term "jurisdiction" is used in its broad, general sense,—that of judicial power. A court may

have jurisdiction of a particular subject matter, but by settled judicial policy ought not to exercise it. Again, it may,—by the settled law, established by its own practice, deemed to be as binding as the written law—have power in a constitutional sense to adjudicate disputed matters of a particular character, acting by recognized unbending principles of procedure, but not jurisdiction to adjudicate such matters in the particular way attempted. In either case it is common to say of an excessive exercise of authority, that the court is without jurisdiction. If the excess has reference to want of power over the subject matter, strictly so called, the result is void and may be successfully challenged directly or collaterally. If it has reference merely to the judicial method of exercising power, the result is binding upon the parties to the litigation till reversed or set aside in some of the ways appointed by law. The former is usurpation; the latter error of judgment. That rule is said to be universal,—to apply to the highest court as well as the lowest. The former cannot render a valid judgment outside of its constitutional authority, while its error within the scope of its authority stands on no higher plane than that of the latter, except for the fact that there is no tribunal to which an appeal can be taken to correct it. As Justice BALDWIN, in *Voorhees v. Jackson,* 10 Pet. 449, 474, put the matter:

"The only difference in this respect between this and any other court is, that no court can revise our proceedings. . . . If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority."

Applying the foregoing to the question in hand, time need not be spent in demonstrating that there was no want of jurisdiction in respect thereto in the sense of want of power. Upon the face of the complaint and the evidence in support

of it, there were many wrongs to be righted. The matter had not passed beyond the control of the court. It had constitutional authority, or, in other words, jurisdiction over such subjects and of the parties. Was judicial power invoked in a proper way,—one which, by settled principles, it was permissible for the court to recognize as legitimate, whether consented to by the adverse party or not? If that must be answered in the negative, then, irrespective of whether the question was suggested for consideration by appellants, and although the judgment entered may be binding as long as it stands, the trial court obtained no jurisdiction of the subject matter of the litigation and its decree must be reversed on that ground. The rule is well stated in 12 Ency. Pl. & Pr. 120, thus:

"Every power exercised by any court must be found in and derived from the law of the land, and be exercised in the mode and manner prescribed by that law. If the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or the court is approached in the manner provided, and consent will not avail to change the provisions of the law in this regard."

This and other courts have frequently declared that principle this way, in substance: Where the circuit court possesses jurisdiction in the broad sense of the term, but ought not to exercise it in the way invoked, or at all in the given circumstances, it should be deemed, to all intents and purposes, except in the sense of want of power strictly so called, to be without jurisdiction. Where it ought, regardless of the attitude of the parties, to decline to act, it should be deemed, regardless of such attitude, not to have jurisdiction to act. *In re Klein,* 95 Wis. 246, 70 N. W. 64; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304; *Scott v. Whitlow,* 20 Ill. 310, 312; *Curtiss v. Brown,* 29 Ill. 201; *Williams v. Detroit,* 2 Mich. 560, 585; *People ex rel. Davis v. Sturtevant,* 9 N. Y. 263; *Bangs v. Duckinfield,* 18 N. Y. 592; *People ex rel.*

Gaynor v. McKane, 78 Hun, 154, 28 N. Y. Supp. 981. An examination of those cases will demonstrate that, while the term "want of jurisdiction of the subject matter," strictly speaking, refers to want of power, in most cases in equity it applies either to whether power possessed should be exercised at all, or in the particular way, or under the particular circumstances; and in all of such cases error is deemed to be judicial in the sense that the result is binding till reversed or set aside in some proper way. When there is said to be want of jurisdiction in such cases, the idea intended to be conveyed is that "it would be erroneous to exercise judicial power, and the decree would be reversed on appeal." *Curtiss v. Brown, supra.* This remark was made in that case:

"We often find the jurisdiction denied, where the power exists, but ought not to be exercised, and in this sense is the word 'jurisdiction' usually used, when applied to courts of chancery. Where there is a want of power, the decree is void collaterally; but where there is said to be a want of jurisdiction merely, it is only meant that it would be erroneous to exercise the power, and the decree would be reversed on appeal."

In *Bangs v. Duckinfield, supra,* the court said:

"There are, I apprehend, few cases in which the position [that the decree is void for want of power] could be affirmed in respect to a court possessing general jurisdiction in law and equity, on grounds relating to the subject matter of the controversy."

And in *Williams v. Detroit, supra,* the rule was declared to be that:

"When the subject of the suit is embraced under any of the appropriate heads of equitable jurisdiction, the court will take cognizance of it, notwithstanding there may be a remedy at law, or other circumstances exist, which would induce the court to refuse to entertain jurisdiction in the particular case, unless the defendant raises the objection by demurrer, or claims the benefit in his answer."

The foregoing leads to this: The circuit courts of this state have, under the constitution, succeeded to all the jurisdiction formerly exercised by courts of law and courts of chancery as well; and though old forms of enforcing judicial remedies have been abolished, that does not mean, necessarily, that the remedies have been abolished. The forms have ceased to exist, but substituted therefor and in place of all we have one form of remedy, denominated a "civil action." Sec. 2600, Stats. 1898. Whether a plaintiff declares in equity or at law, or if at law declares in respect to matters ordinarily cognizable by a court of equity, so long as the subject matter is within the power, strictly so called, of the court to adjudicate it, does not generally involve any question of the jurisdiction of the subject matter or question of whether the complaint states a cause of action, or any other question not subject to waiver by failure to raise it by demurrer or answer or which is not so waived by going to trial upon the merits without objecting other than by a demurrer *ore tenus*. *Becker v. Trickel,* 80 Wis. 484, 50 N. W. 406; *Sweetser v. Silber,* 87 Wis. 102, 58 N. W. 239; *Hoff v. Olson,* 101 Wis. 118, 76 N. W. 1121. The question of whether principles of equity jurisprudence are involved in such a case and can be applied therein, involves a question of practice, strictly speaking. *Martin v. Martin,* 112 Wis. 314, 317, 87 N. W. 232, 88 N. W. 215.

Applying the foregoing here, there is good ground for holding that there is no jurisdictional question in any sense of the term that should be considered at this stage of the litigation, barring the subject of whether the statutes (secs. 3216 and 3239, Stats. 1898) in effect prohibit an action being reorganized as this was,—which will be considered later. But, as before indicated, a departure from established practice may be deemed so important as to be legitimately regarded as jurisdictional error to the extent that, though not available to avoid the judgment as the result of an excess of

power, it may be raised by the adverse party for the first time on appeal as a ground of reversal, or the court may and ought to take notice of it—whether insisted upon by such adverse party or not, and even if such party expressly waives it—and reverse the judgment upon that ground alone. That is recognized in *Livingston v. Livingston,* 4 Johns. Ch. 290, where Chancellor KENT suggested the power of waiver in such cases as exercisable as a general but not as a universal rule. In *Williams v. Detroit,* 2 Mich. 560, it was said:

"It is obvious there must be exceptions to the rule. Otherwise, every question which could be litigated at law, might be brought into a court of chancery for adjudication, if both parties should consent thereto."

True, and so any number of questions between any number of parties, so long as such questions were proper, in any view, for judicial determination, might be so presented, and this court, notwithstanding its power of superintending control, would be powerless to compel observation of those orderly methods prescribed by the unwritten and written law as the embodiment of judicial and legislative wisdom for the highest attainable degree of perfection in the administration of justice: all semblance of a definite system would be lost sight of and the confusion of things would fatally affect the ability of trial courts, and appellate courts as well, to arrive at the real truth and justice of disputed matters with due regard to the convenience of litigants and the safeguarding of their rights. In that view the judicial rule should be firmly applied, suggested in *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704, and *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304, that while a trial court, though possessing power and jurisdiction in the general sense, ought not under the circumstances to exercise it, such exercise, whether by consent of the parties or not, is to be deemed, for the purposes of a reversal upon appeal, akin to total want of

jurisdiction of the subject matter in the broad sense of the term.

It was the purpose of the court in framing the question for counsel, to draw their attention upon the reargument to the suggestion on the main inquiry, of whether the circuit court possessed jurisdiction of the subject of this action in the sense of that term used in the closing lines of the last paragraph. From the arguments of counsel it is not clear that they fully comprehended the import of the question, though the numerous points presented by them in the main bear more or less upon the vital point of uncertainty in respect thereto. Counsel upon the side of appellants do not wholly agree between themselves as to the nature of the defect in the proceedings. It is referred to on the one hand as a defect in procedure, and upon the other as a total want of jurisdiction because in effect prohibited by statute. Appreciating, during the argument, that a defect in a mere matter of procedure is generally waived by not seasonably insisting upon it, and that it does not go to the jurisdiction of the subject matter other than in an exceptional sense, circumscribed within very narrow limits, when the point is not raised specially in the trial court, it was denominated a defect in jurisdiction of the subject matter, because, first, judicial power over the subject, proper to be litigated in this form of action, is dependent upon and wholly given by statute, and does not include the matter in controversy; and, second, the proceedings adopted for vindicating the rights claimed to exist are so utterly foreign to the practice of courts and inconsistent with the status of the parties and the property sought to be recovered in the form of money, that appellants should not be compelled to submit to it, nor should the court in any event permit it. This latter ground, at least, is within the domain of practice, but suggests such an abuse of it as to amount to a defect of jurisdiction of the subject matter, under the doctrine already discussed.

To support the proposition last suggested it is insisted that there are no precedents to be found in the books, of any suit exactly like this, one where the creditors have been permitted, in a winding-up action,—upon its being alleged that the court's receiver and others, by various means, including frauds upon the court, have converted assets of the insolvent to their own use under the forms of law, in part execution of a collusive agreement entered into by them before the receivership proceedings commenced, such commencement and the final payment of the receiver and his legal assistants for their services being also in part execution of such agreement, which in the whole had in contemplation the conversion of all of the property constituting the insolvent's estate,—to make such alleged guilty parties defendants and to redress the wrongs committed by them, enforcing by means of money judgments the restoration to the court's control for the benefit of creditors of an equivalent for the property so wrongfully appropriated. True, the suit is novel in character, but so are the alleged circumstances giving rise thereto. If, before a court of equity could take jurisdiction of a principal subject, complicated by numerous incidental matters germane thereto, it were always obliged to test its authority by precedent, in any other sense than to refer thereto as illustrative of principles to be applied, it would often find itself incompetent to settle a controversy without a multiplicity of suits or to grant relief at all adequate to the nature of the case. The scope of equity jurisdiction is by no means closely fenced about by precedent. It it were, there could be no further development to meet new conditions as they arise. Certain principles in equity jurisdiction are established, and dominate in the administration of justice in that field with as much certainty as do principles upon the law side, so to speak, of the court. But mere precedents are of no avail except to illustrate the extent to which principles have been applied. The textwriters disagree, in some respects, in the

manner of stating that rule, but are in harmony in this: While new principles are not to be added to those long established for the government of equitable remedies, the rules, not the precedents, are to control. There is no vitality in precedents; there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. The ingenuity of man in devising new forms of wrong cannot outstrip such development. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies afforded are inadequate or none are afforded at all, the never-failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose. That is a very old doctrine. It will be found declared in the decisions of this and other courts. Lord REDESDALE's statement of it in *Bond v. Hopkins,* 1 Sch. & Lef. 413, 429, has been adopted by eminent textwriters as being so accurate and clear as to leave little or no room for improvement:

"There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed."

So, it is said, grantable relief in equity, the case falling within its principles, is limited only by the primary right and those so germane thereto as to be deemed properly connected therewith for the purposes of the litigation, or the primary wrong, including those incidental thereto and proper to be redressed therewith.

"It has never placed any limitations to the remedies it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." 1 Pom. Eq. Jur. § 111.

Mr. Pomeroy, in those few lines, most fittingly pictured the nature and scope of equity power. Though no precedent may be at hand in a given situation, since principles of equity are so broad that the wrong involved need not go without a remedy, its doors will swing open for the asking, and a new precedent be made, an old principle again being illustrated. Applying that to the matter in hand, if it falls within some one of the well-recognized heads or principles of equity, we need not hesitate to sustain the jurisdiction of the circuit court because there are no precedents to go by, even if the claim in that regard be borne out by the facts.

The conclusion reached in the last paragraph suggests the next subject to be treated. Does the matter in hand, on principle, belong within the field of equity jurisprudence? That suggests, as a minor question, What is the dominant purpose of this litigation? That is governed by a few elementary principles. It is the settled law that the property of a corporation in a state of suspension because of insolvency, constitutes a trust fund for the benefit, principally, of its creditors, so that its officers cannot deal therewith to their personal advantage. Their status in such circumstances is that of trustees for the creditors, subject, however, to their right to deal with the property, until taken into the possession of the court, as any other debtor might deal with his property, excepting, however, the disability as regards special benefits to themselves. *Hinz v. Van Dusen,* 95 Wis. 503, 70 N. W.

657; *Slack v. N. W. Nat. Bank,* 103 Wis. 57, 79 N. W. 51; *Marvin v. Anderson,* 111 Wis. 387, 87 N. W. 226. Until by proper proceedings the corporation shall have been deprived of its liberty to deal with its creditors, it may, as before indicated, pay one of them in preference to another; but when so deprived by the remedy of sequestration, in an action where such remedy is appropriate, the effect thereof is to impress upon its property a trust for creditors, subject to valid liens thereon, and any interference with such property thereafter in violation of the trust is unlawful. In such circumstances every person in possession of any part of the trust property is in a proper sense a trustee, and subject to be dealt with accordingly. That has become elementary. A receiver, appointed by the court to take charge of such property, by virtue of his office succeeds, for the benefit of creditors, to all the property and all the causes of action belonging to the corporation, in its right, and to all corporate property transferred by it in fraud of creditors, the transferee participating in the fraud, in the right of the creditors themselves; and he becomes, as holder thereof, trustee for such creditors. High, Receivers, § 315.

The last-mentioned feature of the status of a receiver is not always recognized, and for that reason it is sometimes suggested, as in this case, that the right to recover property transferred by a corporation in fraud of creditors is a right of creditors only,—does not pass to the receiver in a winding-up proceeding, and cannot be vindicated in the receivership action. That overlooks the fact that a transfer in fraud of creditors is deemed, as to them, to leave the property subject to their claims substantially as before, that such property constitutes a part of the trust fund for general creditors, and as the entire trust must necessarily be worked out through one proceeding, every holder of property of the corporation, and every holder of property in the right of a corporation, but in fraud of creditors, is, as to them, the pos-

sessor of a part of the fund, and is, as such, a trustee and liable to account as such in the action. The true doctrine on this subject, as applied to an insolvent corporation in a state of suspension, is well stated in Gluck & Becker on Receivers of Corporations, § 58, in these words:

"Property—and by this is meant any conceivable kind—may have gone beyond the recall and reach of the corporation itself, and yet, by reason of the fraud practiced, may still be subjected to the claims of creditors and the rights of stockholders, under the familiar rule that fraud vitiates nearly, if not all transactions. Such property, so far as the creditors and stockholders are concerned, still remains a part of the trust estate and therefore a part of the assets of the corporation. There is no sound reason why the court cannot marshal those assets as well as other assets of the corporation for the benefit of the same parties."

See, on the same point, *Pittsburg C. Co. v. McMillin,* 119 N. Y. 53, 23 N. E. 530; *Rudd v. Robinson,* 54 Hun, 347, 7 N. Y. Supp. 535; *Oneida v. Thompson,* 92 Hun, 16, 37 N. Y. Supp. 889; *Cummings v. Am. G. & S. Co.* 87 Hun, 598, 34 N. Y. Supp. 541; *Proctor v. Sidney S. B. & F. Co.* 8 App. Div. 42, 40 N. Y. Supp. 454; *Hayes v. Kenyon,* 7 R. I. 142; *Monitor F. Co. v. Peters,* 40 Ohio St. 575; *Chicago & A. B. Co. v. Fowler,* 55 Kan. 17, 39 Pac. 727; *Alexander v. Relfe,* 74 Mo. 495; Thompson, Corp. §§ 3562–3564; 2 Morawetz, Priv. Corp. 867. The authorities cited are to the effect that all the assets in which the creditors of the insolvent corporation are entitled to share equally, whether the same are under the control of or have passed from the corporation, constitute a trust fund, and every one holding any part of the same in the capacity of a trustee, whether of an express trust, in any sense, or in any trust capacity known to the law, may be charged in a single action for the conservation of the whole for the use of all the beneficiaries.

Much has been written on the subject under discussion in recent years, but nothing has been really added to what was

decided in *Hurlbut v. Marshall,* 62 Wis. 590, 22 N. W. 852, which followed the decisions in New York under a statutory system similar to ours. The court there said, in effect, that in a suit of this kind all officers, directors, stockholders and all other persons who shall have taken and carried away and converted property or funds of the corporation wrongfully, are trustees for the corporation, and remotely for creditors, and may be compelled in the winding-up suit to account therefor as parties defendant. In the recent case of *Williams v. Brewster,* 117 Wis. 370, 93 N. W. 479, all previous cases on the subject were collated and discussed. It would seem a work of supererogation to go over the subject, or any branch of it again. It is sufficient to state the doctrine, which is as old as the system found in our statutes and long antedates its adoption here. Such doctrine is this: The primary purpose of a suit being to wind up an insolvent corporation and distribute its assets ratably among its creditors, the enforcement of all liabilities of officers and stockholders to the corporation, whether created by law or otherwise, and all liabilities of directors and stockholders to creditors created by law, are germane to the main purpose of the litigation and not only may be joined therewith as a part thereof under the established rules of equity jurisdiction, but, under the scheme of the Code for working out the various liabilities in which creditors of a corporation as a class are interested, must be so joined, and the liabilities of all others to creditors, of a trust nature, may be so joined.

The rule which, independently of the statute, charges an officer of a corporation who has dissipated, wrongfully, a part of the trust fund as a trustee thereof and renders him liable to account accordingly as a party defendant in the action, must, of necessity, charge any other person who has obtained property of a corporation in fraud of creditors as a trustee thereof. So far as they are concerned, the property belongs to the trust fund for the payment of the debts of the corpo-

ration the same in the one case as in the other. The fact that in the one case the liability is to the corporation primarily, and in the other primarily to the creditors, makes no difference. The winding-up suit is to be regarded as impounding all such liabilities for the benefit of all the creditors. If that were not so, while creditors as a class were participating in the distribution of the assets acquired in the right of the corporation, individual creditors would be enforcing liabilities of persons not officers of the corporation who obtained property from it in fraud of its creditors. The orderly way, and the only way consistent with our system, as the court has repeatedly declared, is to treat all who have, as to creditors, directly or indirectly obtained possession of corporate property wrongfully, as liable to account therefor as parties defendant, after the manner of trustees.

Some difficulty has seemed to exist in determining who are and who are not proper parties defendant in such a suit according to the foregoing doctrine, because of the use of the term in *Hurlbut v. Marshall,* "if the officers, directors or stockholders, or any one else have," etc., conveyed or carried away any part of the trust fund; and the language in *Arthur v. Willius,* 44 Minn. 409, 413, 46 N. W. 851, "The proceedings are intended to be so elastic as to be susceptible of development during their successive stages of progress, as to reach not only all the corporate assets, but also all liabilities of stockholders and others so far as necessary for the payment of creditors." That language was used in respect to the proper parties to bring into the litigation as defendants. No serious difficulty need be experienced when it is comprehended that the subject of the litigation in the whole is the gathering in of the parts of a trust fund and the administration of such fund, and that the theory is that the fund is impressed with the trust for all purposes of the suit as soon, at least, as sequestration has been effected, and till the same is turned over to the court or its officers the holders

thereof are in the nature of trustees and liable to account as such. This, of course, does not include mere debtors of the corporation. Neither the language in *Hurlbut v. Marshall,* nor that in *Arthur v. Willius,* was intended to be so understood. If it were otherwise, some evidence thereof would be found in subsequent cases. The result of the decisions on this branch of the case leads to the conclusion that, all the liabilities in this litigation are legitimately to be considered as parts of one trust fund held for the time being by many persons chargeable therewith as trustees, the whole, when gathered into the control of the court, to be distributed among the creditors of the defendant corporation as *cestuis que trustent;* that none of the persons charged occupy the status of mere creditors of the corporation or of any one else.

We have now reached a point where it seems that when this litigation started and when it was reorganized into its present form, the subject to be dealt with in a physical sense was a trust fund. There was then a trust. There were trustees holding the trust fund subject to the order or decision of the court,—to that extent equitably, in any event, bound to execute the trust. There were creditors, a class of persons who were the equitable owners of the trust property—*cestuis que trustent* within well-settled principles—equally interested in the primary right to have the trust fully executed. Where was to be found the remedy to enforce that right? Unity of procedure was necessary to avoid a multiplicity of suits. The right was purely of an equitable character. Does it not follow, necessarily, that the only jurisdiction to cope adequately with the matter was that of equity? The doctrine is elementary, that where the remedial right is equitable the remedy is in equity and nowhere else. So the administration of trusts was, as a rule, never entertained by courts of law. Their machinery and methods are entirely inadequate for the purpose. Equity jurisdiction is exclusive in such mat-

ters in the absence of any statutory regulation of the matter. 22 Ency. Pl. & Pr. 91; 1 Perry, Trusts, § 17.

"All actions for the establishment of the fiduciary relation, for the execution and enforcement of trusts, or of the obligations arising out of the trust relation, and for the investigation and adjustment of differences between the parties to a trust, are within the exclusive jurisdiction of equity," except as modified by statute or special rules of court. "This rule includes, not only express trusts, but also trusts arising by implication of law." 2 Beach, Trusts and Trustees, § 750.

It is not to be understood by the foregoing that no action can be maintained by a *cestui que trust* in any circumstances against a trustee of any sort except in equity. Such actions may be brought, are brought, under a very great variety of cases. The purpose thereof, though, is not to establish and administer or enforce a trust. That is a special field of jurisdictional activity which originated and took its form in courts of chancery and has always been deemed peculiarly a function of such courts. In 27 Am. & Eng. Ency. of Law (1st ed.) 271, the law on the subject, deduced from a multitude of authorities, is stated thus:

"The execution and enforcement of trusts and trust obligations, the adjustment of disputed rights under them, the investigation and settlement of accounts between parties in confidential relations, the establishing of the existence of a fiduciary relationship, are questions which fall naturally within the primary and exclusive jurisdiction of chancery courts."

What has been said would seem to conclusively answer in the affirmative the inquiry as to whether the subject of this action, in its entirety, must be classed as one governed by principles of equity, and be dealt with in the manner attempted, unless the long line of decisions of this court in respect to the matter, pertaining to winding-up suits, either were wrongly decided or do not extend to persons not officers

or stockholders of the corporation who, wrongfully as to creditors, have become possessed of the trust fund or some part thereof so that they may be charged with liability therefor as defendants in the action; or unless bringing into the litigation, as defendants, the receiver and his alleged guilty participants in the wrongs complained of, as they were brought in, and the litigation of the alleged matters in respect to them, was a fatal invasion of a statutory proceeding or such a prejudicial departure from established methods of dealing with such matters as to require the court to condemn the proceedings as fatally tainted with jurisdictional error.

We have now arrived at a point where propositions suggested by counsel for appellants challenge special attention. The following are so dependent upon one of them that they can best be considered together:

A winding-up suit under the Code, with the sequestration feature, is a new remedy given by statute.

Being purely statutory and in derogation of the common law, the legislative enactment authorizing it should be strictly construed.

There is no power of sequestration independent of the statute. Such being the case, every feature of this suit for which justification cannot be found in the statute, evinces a jurisdictional defect.

If the first of such propositions falls, all must fall with it. True, without disclaiming judicial power in the matter, it is laid down by textwriters, and in many judicial opinions, that the general jurisdiction of courts of equity, independently of the statutes, does not extend to the sequestration of the property of a corporation,—its destruction, so to speak, as regards the exercise of its franchise. High, Receivers, § 288. But the remedy by sequestration, as formerly understood, is not a suit, but a means in a suit, ancillary in character, of rendering the purposes of the litigation effective, like the remedy by attachment in an action at law; or it was a means

to enforce a decree in equity, like an execution to enforce a judgment at law. The instrument formerly used was the writ of sequestration. It has been superseded or rendered useless, in most jurisdictions at least, in this country, by a statutory method of sequestration, but the name and the nature of the remedy have not been changed. It is not improbable that the old method of sequestration could yet be resorted to if necessary. Many courts in this country have so held, and some have held to the contrary. A full discussion of the subject may be found in the text and note thereto in 19 Ency. Pl. & Pr. 542. We need not go into the question. It is enough for the matter in hand that the right of sequestration in a suit of this kind, either under the statute or independently thereof, according to the holdings of this court on the subject since 1860, at least, exists; that it goes only to ousting the corporation from the possession and control of its assets; and that the remedy is not necessary nor used in respect to any of the numerous liabilities to creditors in such an action, which the corporation itself could not enforce. No one on reflection, it would seem, would venture to assert that the rights of creditors of an insolvent corporation to treat its property as a trust fund primarily for their benefit, and to a remedy in equity to administer the trust, are dependent on the statutory remedy or any other remedy of sequestration. The trust-fund doctrine itself is purely a judicial creation. 3 Thompson, Corp. § 2951. That author suggests, as the originator of it, Mr. Justice STORY, and the occasion of its incorporation into the jurisprudence of this country, or the initiation thereof, the decision in *Wood v. Dummer,* 3 Mason (U. S.) 308, decided in 1824.

Can there be any doubt that, if there were no statutory aid in the matter, courts of equity would have power to deal with any kind of a trust fund, effectually protecting the interests of all parties therein, and in a single action bringing all of them before the court? There is no such thing under

the statute, nor was there at common law, as a suit or action, so to speak, of sequestration. There was and is a judicial remedy in equity to enforce a trust in favor of creditors respecting the property of an insolvent corporation, and in aid thereof we have the sequestration remedy afforded by the statute. This court early took most advanced ground on the subject of whether the equity power of the court in such matters was dependent upon the statute. *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57; *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295; *Coleman v. White,* 14 Wis. 700; *Merchants' Bank v. Chandler,* 19 Wis. 434; *Terry v. Chandler,* 23 Wis. 456. At the time of the early decisions the only suggestion in the statutes of a remedy to sequestrate the property of a corporation was by petition to the court in an action after the return of an execution, upon the judgment therein, unsatisfied. The statute read as follows:

"Whenever a judgment shall be obtained against any corporation incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied, in whole or in part, upon the petition of the person obtaining such judgment, or his representatives, the circuit court within the proper county may sequestrate the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same." Sec. 18, ch. 148, R. S. 1858.

When *Adler v. Milwaukee P. B. Mfg. Co.* was before the court, it was insisted that the statutory method of obtaining sequestration was exclusive, and that it was not by action, but by petition. Some uncertainty existed as to whether the statute on the subject was sufficiently definite to be enforcible. This court, after a thorough review of the subject, held as indicated in the following language:

"From this view of the general powers of courts of equity to manage and control the affairs of failing and bankrupt corporations it becomes a matter of very little practical importance whether . . . sections 18 and 19 of chapter 148

of the revision of 1858 [now sec. 3216, Stats. 1898] are operative or not. If operative they are in affirmance of the law as it was previously understood; if inoperative, no substantial change is occasioned. If they can be enforced, they only go to strengthen the powers which courts of equity heretofore possessed, to remove doubts, and to render the rules by which such proceedings are governed more stable and undeviating."

Our statute was adopted verbatim from New York, and the courts there early held that a bill in equity, according to the practice in vogue in this state since the decision of the case to which we have referred, was proper, irrespective of the statute on the subject. The same difficulty was experienced there as here, in respect to the real purpose of the statute makers, as will be found by reference to *Judson v. Rossie G. Co.* 9 Paige, 598. In High, Receivers, § 298, the statutory remedy, so called, of sequestration is referred to as a "right which is given by statute in many if not in most of the states; and it may be regarded as an extension or enlargement of the general jurisdiction of courts of equity." It will be noted that in the early case decided in this state it was held that the statute did not give any right not possessed before. In *Hanson v. Davison,* 73 Minn. 454, 461, 76 N. W. 254, under a system the same as ours, the court referred to the statutes on the subject in effect thus:

They indicate and regulate to some extent the remedy, leaving to the court the duty of making it effectual by an application of the principles of equity jurisprudence:

We should say in passing, that after the early decisions in this state were made, to which we have referred, the statute was changed by adding the word "action" after the word "petition" so as to make the same conform to the judicial policy of the state.

Enough has been said on this subject to indicate clearly that it long since ceased to be an open question here, as to whether the sequestration feature of our statutes in respect

to insolvent corporations is anything more than an aid to the power previously possessed by courts of equity, if even that. It has been common to speak of a winding-up suit as a statutory action, but that came about because of statutory features or aids: by no means because the remedy afforded creditors, to treat the property of an insolvent corporation and other liabilities as a trust fund for their benefit, was originated by statute.

Counsel for appellants say that the plaintiffs could act only in the right of the receiver, and as he could not pursue the winding-up action they have not the capacity to do so. That proposition primarily goes to the legal capacity to sue, and would have been good ground, if true, for a demurrer to the amended complaint. Since no such demurrer was interposed, and the defect, if there be one, appears on the face of the complaint, it was of course waived. *Moir v. Dodson,* 14 Wis. 279; *Smith v. Peckham,* 39 Wis. 414; *Wood v. Union G. C. B. Asso.* 63 Wis. 9, 22 N. W. 756.

Viewing the proposition in its jurisdictional aspect—that of whether the reorganization of the action so as to permit it to proceed as it did was such a violation of established practice that it should be condemned on that ground alone—we are unable to perceive why respondents should not pursue the winding-up action because the receiver could not. Counsel cite to our attention authorities to the effect that a receiver cannot institute a winding-up action; that if a receiver sues in the progress of administering his trust, as he obviously may in many situations, he must use the same remedies as any other party. That is, if the cause of action is equitable he must sue in equity, and if at law he must institute a legal action; that a receiver cannot prosecute for the collection of a penalty upon an official bond of the person whose property he is appointed receiver of, because the creditors are not beneficially interested in such a penalty, and that a winding-up suit must be brought by one entitled by statute to bring it.

How any of those propositions, if correct, support the idea that because a receiver cannot prosecute a winding-up action the creditor cannot, is not perceived. The logic indulged in by counsel would seem to be that because a party not entitled to prosecute a particular suit is not entitled to do so, the party so entitled cannot. Certainly, we are not called upon at this late day to declare that creditors of an insolvent corporation may institute an action to administer its property primarily for their benefit, and use therein all the machinery provided by law to make such action effective, including that for sequestering the corporate property,—taking it from the corporate control into that of the court. The receiver never institutes such an action, nor does he prosecute it, except in the name of the creditors, by their consent, and under the order of the court. The action is the creditors' action, when brought by them, from start to final judgment, the purpose thereof being to bring all the property of the corporation, and all property, whether belonging to the corporation or not, to which its creditors on the basis of equality have a right to look for the payment of their debts, into one fund, and to administer the same primarily for their benefit. It may, and necessarily must, be pursued to the end by the equitable owners of the fund. The fact that the receiver cannot pursue the action only argues that the creditors may and must. In their names the trust fund must be brought under the control of the court. If a judgment in the action for the recovery of property or its value be entered, it is to be executed in the names of the plaintiffs, not that of the receiver, the proceeds, however, remaining under the control of the court. The office of the receiver is administrative from beginning to end. *Lyman v. C. V. R. Co.* 59 Vt. 167, 180, 10 Atl. 346. He can institute suits which appertain to such duties. The creditors cannot, without violating established practice, bring such suits. So it seems that the *cestuis que trustent,* the creditors, and the receiver, have separate and well-defined spheres of

action. All that appertain to the establishment and enforcement of the trust belong in that of the former; all that appertain to the mere administration thereof belong in that of the latter. So to say that because a receiver cannot institute or prosecute an action of this kind the creditor cannot, is clearly a *non sequitur.*

Again it is said that a person colluding with the receiver in wasting the trust fund cannot be made a party to a suit originally commenced, and called to account in that way: (a) because there is no authority for such practice in the statutes; (b) because the receiver is not a trustee for creditors; (c) because only specific property could be followed in any event, and that, as shown by the complaint, not being attainable, there is no remedy. We will consider each of such propositions.

a. We have already shown that the statute is not a limitation upon the equity power of the court to enforce a trust where the subject of the trust is the property of the insolvent corporation. It is rather an extension of such power, if any were needed, so that, under general principles of equity jurisprudence, in a suit to establish a trust or to enforce it, every person holding any part of the trust fund in the capacity of a trustee in any legitimate sense, may be made a party defendant. We need not look into the statute for authority to do so.

b. The idea that the receiver is not a trustee for creditors seems to have no merit. It springs from the idea that a receiver is the agent of the court—"the arm of the court," as the term is often used. But he is not the trustee for the court in any legitimate sense. Neither the court nor its receiver has any real interest in the property to be administered. The legal title which vests in the receiver is in trust, not for the court, but for those having the equitable title, who, in a case of this kind, obviously, are primarily the creditors. So, while he represents the court in the sense that he derives his power from the court and acts for the court, he represents all the

parties entitled, primarily or otherwise, to the trust fund, and is a trustee for them, and is so treated in all the authorities. *Atchison v. Davidson,* 2 Pin. 48; *Henning v. Raymond,* 35 Minn. 303, 29 N. W. 132; *Haxton v. Bishop,* 3 Wend. 13; *Curtis v. Leavitt,* 15 N. Y. 9, 44; *Libby v. Rosekrans,* 55 Barb. 202; High, Receivers, § 314; Beach, Receivers, § 667; 23 Am. & Eng. Ency. of Law, 1065. The law on this question, as it is found generally laid down in the books, is not anywhere more tersely stated than in the early case decided in this court and above cited, where it is said: "The property, to all intents and purposes, is the property of the creditors; and the receiver holds the property and assets in trust for the creditors, as the agent of the court."

c. We fail to see how the doctrine—that when trust property has lost its identity as such and there is no property into which it can be traced and which can be said to presently include it, when there is no specific thing which can be pointed to as the subject of the trust, in a controversy between the beneficiary and debtor of the trustee for the payment of his claim out of such debtor's property, the trust must be deemed to have perished with the destruction of the identity of the subject thereof—changes the status of such beneficiary as regards such property to that of a mere creditor, as held in *Nonotuck S. Co. v. Flanders,* 87 Wis. 237, 58 N. W. 383; nor how the general doctrine, that when trust property has changed in form so as to be impossible of identification the *cestui que trust* cannot claim any specific thing as forming the subject of the trust,—applies to this case, or leads to the conclusion that a destruction of the subject of the trust terminates the trust relation not only as to the property but as to the beneficiary. True the court, in the *Nonotuck Case,* quoted with approval from *Little v. Chadwick,* 151 Mass. 110, 23 N. E. 1005, these words: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some

specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails." But the words "the trust ceases," and the words, "the equitable right of the *cestui que trust* to follow it fails," refer, not to the destruction of the trust relation when once established between the trustee and the *cestui que trust,* and disability of the latter to compel the former to account, but to disability to claim any specific property as constituting the subject of the trust. The trust fails only in respect to there being property impressed by a trust and recoverable *in specie.* It would be a strange doctrine to promulgate, that a trustee, by destroying the trust fund, could thereby terminate his trust in all respects and the *cestui que trust* have neither a remedy to reach the specific property, nor one to compel the trustee as such to account for the value thereof. We assume, when counsel say there is no remedy, that they mean there is no remedy in equity. They cannot mean that there is no remedy at all. The mere statement of the matter would seem to so exhibit the infirmity of the proposition suggested as to leave little justification for further considering it. Property impressed with a trust retains its character in that regard in the hands of the trustee regardless of any change in form which leaves the identity of it in any legitimate sense discoverable, and also in the hands of any other person claiming under the trustee, with notice of the trust, till such trust shall have been executed. 27 Am. & Eng. Ency. of Law (1st ed.) 262, and cases cited; Perry, Trusts, § 828. Trust relations once created, as regards the personal element, survive the wrongful removal of the subject of the trust in any way beyond the reach of the beneficiary. The latter may, by judicial proceedings, enforce an accounting by the trustee for the full value of the property wasted or otherwise wrongfully converted. The uniform rule as to administrators, executors, receivers, and trustees, in

general, is to charge them with the trust fund and require them to account for it or its value. *Barker v. Barker,* 14 Wis. 131; *Williams v. Williams,* 55 Wis. 300, 12 N. W. 465, 13 N. W. 274; *Simmons v. Oliver,* 74 Wis. 633, 43 N. W. 561; *Oliver v. Piatt,* 3 How. 333; *Lathrop v. Bampton,* 31 Cal. 17. True, the liability of the trustee, when there is no trust property, is personal, and he may be sued at law. True, also, there are authorities to the effect that the right is strictly legal and the remedy legal. *Lathrop v. Bampton, supra.* But the better rule, it seems, is that the *cestui que trust* may always sue in equity for an accounting. Perry, Trusts, § 843. But, in any event, when the liability is germane to a principal cause of action which is equitable, as in this case, it is enforcible as a part of a single subject matter.

The point is made that the suit, as reorganized, was to recover upon a cause of action sounding in tort, and that such matters are not within equity jurisdiction. The conclusive answer to that is that the cause of action as to each of the parties here is for an accounting, not for damages. Whether the recoveries went beyond the cause of action does not go to the subject we now have under consideration. *Dunphy v. Kleinsmith,* 11 Wall. 610, upon which counsel rely, supports, so far as it goes, their claim that appellants may be made to restore to the trust fund whatever they wrongfully obtained from it.

Appellants put great confidence in the proposition that the creditors have no right of action against the receiver. Why the *cestuis que trustent* have not the same right to a suit in equity to enforce a trust when the receiver is the trustee and the court appointing permits or orders that he be proceeded against that way, as in case of any other trustee, is difficult to understand. Counsel upon neither side of the case have produced any authority directly upon the question. That authorities are difficult to find in respect to the matter is not to be wondered at, since the remedy by summary proceedings

before the court for an accounting, and an action thereafter upon the receiver's bond, if necessary, are the usual methods adopted to redress a wrong committed by a receiver. While it is true that the court may compel the receiver to account at any time, and in any manner it sees fit, not transcending the limits of judicial discretion, and true that he is not a litigant in the action unless legitimately made so,—he is the agent of the court still, being trustee for the creditors as we have seen, and under the control of the court. Why may not the court, then, adopt the method resorted to in this case under the peculiar circumstances disclosed in the complaint? That it was within judicial power to do so, unless for some reason judicial discretion was abused, follows necessarily from the fact that the trial judge in such a matter is not limited to any particular method. The fact that the usual course is to cite the receiver before the court without the use of any process, strictly so called, does not argue that he cannot be compelled by such a process to appear, as he undoubtedly may be. The fact that the disputed matters upon the receiver's account are usually tried by the court in a summary way, or, if complicated, they are referred to a master and passed upon by the court upon the coming in of his report, does not argue very strongly that the court might not cause issues to be framed in respect thereto and tried as ordinary issues are tried before the court; and that even an advisory verdict of a jury might be taken if deemed proper by the court, cannot well be doubted. The dearth of decided cases as to such matters only evidences that the control of a court of equity over its receiver, and the manner in which he shall account, is so absolute that whatever proceeding may have been adopted from time to time in such matters, the instances are extremely rare where any one has ventured to question it, and in such instances, so far as we can discover, not successfully.

In *Akers v. Veal,* 66 Ga. 302, it was held that the general

power of a court of equity as to a receiver's account extends to even requiring a formal trial of issues, but that the receiver is not entitled to a jury trial as a matter of right, in the absence of a special statute creating it. In 23 Am. & Eng. Ency. of Law, 1061, a rule is deduced from the authorities cited, and stated thus:

"A receiver is directly responsible to the court by which he was appointed, and is accountable in such manner, or to such persons, as the court may direct;" and such court "may, in its discretion, require him to account at any time."

In *Schenck v. Ingraham,* 5 Hun, 397, the facts were these: In a suit to wind up a partnership, the partnership assets came into the possession of a receiver appointed for that purpose. In the settlement of his account, by false representations made to the court respecting the amount of labor performed by him and his attorneys in the administration of the trust fund, an order was obtained allowing them $6,218 out of a total fund of $8,415.04. The entire fund was distributed by order of the court. The creditors commenced an independent action in equity to annul the order upon the ground of fraud. Such creditors had not become parties to the original action. Issues were joined in the second action, and upon a trial thereof the complaint was dismissed upon the merits. The plaintiffs appealed. In the right of the plaintiffs in such action a motion was then made in the original suit to have the order set aside and vacated, and the motion was denied. An appeal was then taken from both the judgment in the creditors' action and the order in the receivership action. On the appeal the judgment in the creditors' action was affirmed on the merits, but it was held that, were the evidence sufficient to sustain the allegations of fraud, the judgment would be reversed. The appeal as to the order was successful. It was reversed upon the ground that sufficient was shown upon the motion to establish that it was fraudulently obtained. The court directed the appellants to

be made parties to the proceedings in the receivership action, and that the order awarding to the receiver compensation for his services and expense of legal assistance, and distributing the residue of the trust property and discharging him, should be vacated. We do not find that this case has been disturbed in the courts of New York. It would indicate that an order obtained by fraudulent representations to the court, settling a receiver's account and distributing the trust property, may, if the court having jurisdiction of the matter permits, be set aside in an equitable action brought in the same court by a person interested in such fund; and that in such action all the guilty participants in the fraud may be made to account. We need not apply the doctrine of that case further than to hold that the action in which the receiver was appointed being still pending, and the jurisdiction of the court to vacate the order still perfect, it may be vacated on motion, and an issue then be raised in the action covering the matter of the account, and tried. The particular manner of causing the issue to be formed being within the discretion of the court, some serious prejudice to the rights of the adverse parties must needs be shown to warrant condemning the one adopted as jurisdictional error.

Monitor F. Co. v. Peters, 40 Ohio St. 575, is another instance of a court entertaining an independent action in equity to coerce its receiver to do his duty. The decision was grounded on the idea that creditors are entitled to have the trust fund out of which they are to obtain their pay, if at all, promptly administered, and that, though the ordinary method of enforcing that right is by proceeding in the receivership action, the discretionary power of the court over the matter is sufficient to permit such right to be vindicated in an independent action. Counsel seem to concede here that if such is the case, the power in that regard is broad enough to accomplish the same thing by making the defendant respond as a party in an action wherein he is accountable.

Mills v. Ross, 57 N. Y. Supp. 680, is cited to our attention. The facts there were these: A receiver, by order of the court, paid out the fund in his hands. Persons claiming to be the real owners thereof, and that it was obtained from the receiver wrongfully, brought an independent action against the persons so acquiring it to recover the same, and it was held that the action was not maintainable; that the plaintiffs should have sought relief in the receivership action. We are unable to discover anything in the decision militating against the right of a court to allow its receiver to be proceeded against in the action in which he was appointed, if it sees fit.

Clapp v. Clapp, 7 N. Y. Supp. 495, is cited to our attention as indicating that the practice adopted in this case was entirely wrong. A careful analysis of the case shows that it is rather against appellants' position than in favor of it. The facts were these: A receiver having been guilty of misfeasance and nonfeasance to the prejudice of creditors, to whom the property he was appointed to take possession of and administer primarily belonged, was induced to resign his trust and surrender the property in his possession to a successor without any legal proceedings to that end. A successor was appointed. The order entered in respect to the matter designated a referee to state the predecessor's accounts with the trust property and to ascertain what allowance should be awarded him for expenses and services, and what payments he had received. In advance of the coming in of the report he turned over to his successor all the trust property in hand. He made a claim for a balance due, of $15,995.15 for expenses, commissions, and services. On the hearing before the referee the creditors were parties and were fully heard. The referee allowed $9,762.62. Thereupon the new receiver paid $5,000 upon such allowance. There was proof before the referee of gross mismanagement of the trust, both by acts of commission and omission. The court upon the coming in

of the report changed the conclusions of the referee in a radical manner. One of the changes consisted in this: Upon the ground that the receiver failed to collect certain claims which he ought to have collected, and failed in other respects to perform his duty, to the great prejudice of the creditors, whereby greater loss to the trust fund was suffered than the total amount due such creditors, he was peremptorily ordered to pay the claims of such creditors, aggregating over $12,000. The idea entertained by the court was that the amount of the uncollected claims should be counted as loss regardless of the fact that the title to such claims passed to the new receiver upon his appointment, and regardless of whether they were collectible by such receiver or not. There was no proof before the referee or the court as to the collectibility of such claims. Upon appeal it was held that the deposed receiver was liable to account for the full amount of all loss caused by his mismanagement, but only upon proof being produced establishing the amount thereof; that since a new receiver was appointed, the liability was to him, the whole matter to be worked out through that channel, and that he possessed title to the uncollected claims and title to the liability of the old receiver to account for the loss caused by him. "It is to him," said the court, "that he [the old receiver] has become accountable, inasmuch as the latter has been placed in his own relation to the creditors who are seeking payment, out of this estate, of the debts owing to them." 1 N. Y. Supp. 926. The order of the court below was reversed, with directions to such court to send the matter to a referee to determine the amount of loss to the estate caused by the misconduct of the ex-receiver, giving the creditors interested full opportunity to be heard, a final order to be entered upon the coming in of his report in accordance with the opinion of the court.

The foregoing history is not taken from 7 N. Y. Supp. 495, referred to by counsel. The opinion there was delivered

upon a reargument. It cannot well be understood without being read in connection with the opinion given when the case was in fact decided. *Clapp v. Clapp,* 1 N. Y. Supp. 919. From such history it will be seen that the liabilities claimed against the receiver here are, in the main at least, within the principle of that decision. The idea advanced by counsel, with supporting authorities, that for whatever the receiver lost by negligence or fraud he is only personally liable to the creditors in an action at law, or that there is no liability at all because a destruction of the trust fund ends the trust, and the idea that the only liability for the breach of trust is on the receiver's bond, do not seem to have occurred to or been appreciated by the learned court that made the decision. Every expression in the opinion and every conclusion reached is in strict harmony with the liability of the receiver here as claimed upon the face of the complaint. The practice adopted there in settling the receiver's account was by trial before the referee. Whether a trial in some other way would have been permissible is not adverted to in any respect. The practice adopted, of assuming that assets have been lost merely because not collected in money as they should have been by the ex-receiver, notwithstanding the title thereto has passed to the new receiver and notwithstanding they may be convertible into money by him, was condemned. There being a receiver, through whom the rights of the creditors could be worked out, the practice of requiring the old receiver to make good the loss caused by him by compensating the creditors directly, was condemned. The practice challenged here by counsel, as we have seen, that the unfaithful receiver is liable to respond to a trustee for the creditors to the extent of the full amount the trust property has by his mismanagement been diminished, was approved. The practice of forming and trying issues in that regard, giving to creditors a full opportunity to be heard in respect thereto, they being deemed the real parties in interest, was ap-

proved. All these principles, on the reargument, were affirmed, the court using the language quoted by counsel as supporting their contention that the creditors have no cause of action and cannot have one in the circumstances of this case:

"What was left against the appellant [the old receiver, after he delivered to his successor the property on hand] was a liability to account for and pay over to his successor so much as the estate had been diminished or lost by his inattention, carelessness, or misconduct. And no authority has been found or cited imposing any greater degree of liability than this upon him. To that extent he should . . . indemnify this estate for the loss it has sustained through his mismanagement and misconduct. But before any further proceedings can be had for the payment of the loss so sustained, it must be ascertained by proof showing how far the assets diminished in value, or were lost, owing to the misconduct of appellant as receiver. The proceeding in the end, so far as he may be liable in case of his nonpayment of the amount in this manner to be proved against him, will be one for his punishment by way of contempt."

The court, as will readily be seen, used the expression with reference to the proceedings in that case, that "before the court should compel the old receiver to pay any sum of money on account of the loss sustained by creditors through his mismanagement, the amount of the loss should be ascertained." That is, of course, sound. The respondents proceeded here in harmony therewith. The court further said that, the amount of the receiver's liability having been ascertained upon a trial of the issue before the referee, and the finding in that regard affirmed, and he having refused to pay the same, the proceeding to enforce payment is "one for his punishment by way of contempt." That certainly is the usual way of enforcing a judicial order for the payment of money. It is an unwarranted conclusion to draw therefrom, however, that judicial power cannot be exercised in any other manner. The learned court did not say that it could not.

We certainly cannot hold that a person, possessed of ample property within the reach of the court to pay a sum of money ordered by it to be paid by him, can successfully defy it to enforce its order other than by contempt proceedings. The constitutional power of circuit courts, as we have seen, extends to the use of any writ necessary to "carry into effect their orders, judgments and decrees." It may use a writ of *fi. fa.*, or any other known to the law, which is appropriate, or even frame a new one if no old one is sufficient. Since the policy of our law is against imprisonment for debt, it would seem that no legitimate objection can be raised by the wrongdoer because his liability is enforced by a mere judgment for money collectible by execution instead of an order or judgment in form requiring payment of money, enforcible by contempt proceedings. So it seems, as indicated at the outset, that instead of *Clapp v. Clapp* sustaining counsel's position that in the circumstances of this case there is not, and cannot be, any cause of action in favor of creditors, it supports the very opposite, except as regards the mere matter of practice here adopted, of compelling the receiver and his associate wrongdoers to account to the court for the benefit of the creditors and at their suit as parties in the action; and that is not condemned in any way, so far as we can discover, since the holding that the account should be made to the new receiver as the representative of the creditors, instead of to them directly as a class, the money recovered to be paid into court and distributed according to the court's order, is grounded on the fact that there was a receiver standing in the place of the creditors, to whom an accounting could be made. It is inferable from the court's opinion that, if the amount of the liability had been properly established in the trial before the referee, the order for the payment thereof directly to the creditors in accordance with their respective equitable interests therein, instead of to the receiver for them, would not have been deemed a prejudicial

departure from the regular order of judicial administration in such matters. We have spent much time on this case because of the great importance appellants' counsel seem to attribute thereto in support of their views, while, as indicated, to us it is more in harmony with the views of respondents' counsel.

A number of cases are cited to our attention, holding that proceedings must be had in the receivership action to settle the receiver's account before action is maintainable upon his bond. We are unable to see how the decisions or the expressions made therein throw any light on the point under discussion. This quotation is made from Gluck & Becker, Receivers, 414:

"If he owes a duty to a creditor of the corporation and he fails or omits to perform that duty, the trust estate will not be made chargeable for such neglect of duty if the loss has been sustained by the creditor, but the liability of the receiver will rest entirely upon his personal undertaking, and can only be enforced in a court of law."

Taking that literally, the absurdity of it is such that no comment thereon would seem to be necessary. The idea that the only remedy of a creditor of a corporation, whose property is in the hands of a receiver, for misfeasance or nonfeasance in his office to the injury of such creditor, is an action at law, has no support in principle or authority. The textwriter did not mean that, though his language might well be taken that way, without careful consideration, as indicated by the use thereof by the learned counsel for appellants. The author based the text on *Gaehle v. Snowden,* 56 Md. 345. Counsel cite the same case, and it seems without appreciating what is really there decided, which is that the violation of a purely personal obligation incurred by a receiver to a creditor—such as a failure by the former to file the latter's claim left with him for that purpose, whereby the claim is lost—does not create any liability of the former as trustee, to be re-

dressed in equity or at all; that it is a mere negligent act, to be redressed, if at all, the same as if committed by any other person to whom the claim might be intrusted for placing it on file. The court said it was the duty of the creditor to file his claim with the court, not with the receiver. It will be readily seen that the decision is sound, but very far removed from any question involved here.

The proposition of counsel, that there is no cause of action against a receiver in favor of the creditors, pursuable in the winding-up action in the circumstances of this case, has better support in *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, than anywhere else, or than any authority cited to our attention by counsel, so far as appears, or any which we can discover. It is confidently asserted that such decision really rules this case on such proposition in favor of appellants, if adhered to. That action was reorganized very much as this was. The difference between the two is this: There a new receiver was appointed, who was by order of the court joined with the creditors, while here the action was ordered to proceed in the name of the creditors alone. The question there, as to whether the ex-receiver could be required to account by action, was not raised by counsel nor referred to in the opinion. It seems to have been taken for granted that he could be so required, if the court so ordered. It was held that a good cause of action was stated in the complaint against such ex-receiver in favor of his successor, but that it was solely the cause of action of the latter; that the creditors had no cause of action against him, while they did have a cause of action, well stated in the complaint, for winding up the corporation and administering its property as a trust fund for the benefit of creditors, in which all parties holding parts of such trust fund were properly made defendants in order to reduce all to the possession of the court, represented by its receiver, for the benefit of creditors. The liability of Smith was made up of

two elements: $281.73 alleged to have been fraudulently paid him by the officers of the corporation before the receivership action was commenced, he being a guilty participant in the fraud; and $500 and other sums not specified, lost or wasted by him through nonfeasance or misfeasance in the performance of his duties as receiver. That the liability of the old receiver for whatever it was worth was an asset, so to speak, of the trust fund, was not and of course could not well be questioned. But as the court,—perhaps without that careful consideration of the matter that might have been given thereto, that, however, not being apparent at the time of the decision,—held the title to the liability to be legal in character, to be vested in the new receiver and enforcible only by him in an action legal or equitable in form, it was decided that the two causes of action—one in favor of the new receiver against the ex-receiver, and the creditors' action against the other defendants—were improperly united. From the foregoing analysis of the situation it will be seen that the legal title to the right against the old receiver as such, and that against him by reason of his having obtained moneys of the corporation by fraud before his appointment, were no more vested in the new receiver than the title to anything else forming a part of the corporate assets, and that the equitable right to such liability was in the creditors of the corporation the same as the right to any other of the numerous liabilities which they were entitled to have marshalled into the possession of the court in the form of money for the payment of their debts. As to the $281.73, the old receiver, upon principles well established, might have been made a defendant at the time the action was commenced. He was properly made a defendant as to that part of the trust fund which he came to the possession of after he was appointed receiver, and which he wrongfully retained, if any one so circumstanced was properly joinable, unless the fact that he was answerable to the court therefor in a sum-

mary way, after the manner generally adopted for compelling receivers to account, was exclusive. If that feature of his case precluded the creditors from proceeding against him by action, so it did, likewise, the new receiver. The latter, in the performance of his administrative duties, had a right to institute proceedings to compel the old receiver to account. The creditors, as equitable owners of the property misappropriated by the old receiver, had the same right. In either case, money produced would form a part of the trust fund in the hands of the new receiver. Neither the receiver nor the creditors had a right, strictly speaking, to a remedy by action against the old receiver. Both had a right to the ordinary remedy against him. That either did not have a right to the extraordinary remedy in such cases of a civil action, if the court was willing or ordered its receiver to be charged in that way, unless to permit such a proceeding would be an abuse of judicial discretion, would be difficult to maintain. It seems that the creditors did have, as part of the primary purpose of that action, the right to join the old receiver and call him to account for the money fraudulently obtained by him before the receivership suit was commenced, without the permission of the court except as to time of bringing him in, and the right to join him as to the wrongful use of the trust fund, by the court's permission, unless such practice, as before indicated, must be deemed so prejudicial to the rights of parties and the orderly conduct of judicial proceedings as to be regarded as jurisdictional error.

The conclusion from the foregoing is that, while it is true that creditors in the circumstances of those in this case have no right of action against the court's receiver, using the term in the sense of a civil action pursuable as a matter of absolute right, they have a wrong to be redressed, either by a civil action or by a special proceeding to be instituted by them; and since the court has, within the boundaries of a

broad discretionary authority, the right to say how such redress shall be accomplished, circumstances may justify a procedure in the form of a civil action, the parties being arranged according to their interests; and if the court orders that procedure to be adopted, then the creditors may be said to have a right of action against the receiver.

Counsel urge upon our attention these propositions: (a) The court has no power to enter a judgment in a winding-up action against the receiver and those acting guiltily with him in diminishing the trust property, for the amount of the loss caused by them. (b) The statute does not authorize making the receiver, or any officer of the court, a party. (c) The word "trustees" in sec. 3237, Stats. 1898, does not include receivers. (d) The statutory right against officers has reference to such officers while acting in office for the corporation. (e) The power of the court is limited by the provisions of the statute. (f) No judgment can be entered in such an action as this, other than one specifically authorized by statute. They all proceed upon the theory that the statutes, sections 3216 to 3239, inclusive, give a new right and a new remedy, with appropriate procedure, and are exclusive. That, as we have seen, is not the case. The statutes, generally speaking, are merely declaratory of the common law. *Gores v. Day,* 99 Wis. 276, 74 N. W. 787, is to that effect, so far as it was necessary to go in that case; while in *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57, as we have before seen, even as to the sequestration feature of the statutes, it was held to have added nothing to the power of the court which it did not possess independently thereof and was permitted to exercise when necessary; that "they [the statutes] only go to strengthen the powers which courts of equity heretofore possessed, to remove doubts, and to render the rules by which such proceedings are governed more stable and undeviating;" that in any event they only govern the proceeding against the corporation itself "when

a sequestration of its stock, property, things in action, and effects, and the appointment of a receiver, are sought." The method of reaching others holding property to which such sections are applicable, so far as not specially prescribed, was left to be governed by the usual practice in courts of equity.

Counsel for respondents on this branch of the case, contend that the word "trustees," as used in sec. 3237, Id., includes a receiver. We are unable to read the statute that way. It seems to plainly refer, as counsel for appellants contend, to a trustee in his capacity as an officer of a corporation, not to one acting for the corporation and others as agent of the court. The proposition that R. E. Rust was properly made a party defendant as a trustee of the corporation, cannot be approved.

Clarke v. Banner & V. P. Co. 50 Wis. 416, 7 N. W. 309, is cited as indicating that in any event the making of Rust and his associates parties for any purpose except that of discovery, was improper. It is difficult to see how that case can have any bearing on any question raised here, except to condemn the practice of making persons parties defendant who are alleged to have come into possession of assets of the corporation before sequestration proceedings were started, in fraud of creditors. It would be decisive against the respondents on that subject, if sound. That it is otherwise, tested by any or all of the numerous decisions made before and after its rendition, touching to some extent or entirely the subject involved, will appear obvious from a mere statement of what was there held. The gist of the decision is stated correctly in the syllabus thus:

"In an action under secs. 3216–3228, R. S., . . . where it is not sought to hold the officers or stockholders personally liable under sec. 3221, the circuit court has power only to sequester the property, to appoint a receiver, and to compel the corporation to account."

"In respect to any person to whom it is alleged that any transfer of property of the insolvent corporation has been made," it can "merely compel such person 'to testify in relation thereto,' " under sec. 3228.

It will be seen that the court adopted the idea that the statute affords a new and exclusive remedy, and that, as it makes no provision for judgment against persons obtaining property of the corporation in fraud thereof or of its creditors, but does provide by sec. 3228 that such persons may be compelled to testify in relation to such property, and does provide by sec. 3219 that the receiver appointed in the action may sue for and recover property belonging to the corporation, the right of action is vested wholly in the receiver. The fact was overlooked that sec. 3219, as it has many times been construed, does not refer to persons holding the property of the corporation as trustees for it or for its creditors; also the fact that secs. 3237 and 3239 expressly provide that officers of corporations may be made to account in a suit by creditors for all loss caused by their mismanagement, and to render up an equivalent in money for such loss, and that guilty participants with them may also be made to account as parties and render up their ill-gotten gains. The further fact was overlooked that sec. 3228 prescribes only a rule of evidence, so that guilty parties may be made to testify in respect to their wrongful conduct regardless of the general rule that a person cannot be compelled to incriminate himself. In *Hurlbut v. Marshall,* 62 Wis. 590, 22 N. W. 852, decided a few years later, the doctrine of *Clarke v. Banner & V. P. Co.* 50 Wis. 416, 7 N. W. 309, was entirely ignored, as it has been ever since the case was decided. We do not find it referred to in any subsequent case. It has been cited to the court's attention in briefs of counsel, but for some reason the opportunity has not been heretofore improved to record the fact that it does not state the law correctly—that it is entirely out of har-

mony with the decisions of this court from *Adler v. Milwaukee P. B. Mfg. Co.* to *Hurlbut v. Marshall,* and was in the latter case in effect overruled.

From numerous authorities holding that a court of equity has no inherent power to dissolve a corporation, and that statutory power in that regard, "both as to the conditions upon which it may act and the judgment it may enter, must be strictly followed," counsel for appellants deduce the conclusion, seemingly, that such doctrine applies to the judicial power to sequester property of an insolvent corporation and to wind up its affairs so far as necessary to apply its assets in payment of its liabilities. The language of the proposition is borrowed from 22 Ency. Pl. & Pr. 1236, but changed by substituting for the idea of dissolving the corporation, strictly so called, that of taking possession of corporate property and administering the same for the payment of its debts. The two are entirely distinct, and so far as they are referred to in the statutes are there so treated. Secs. 3216 to 3239 refer to the latter; secs. 3240 to 3251 to the former. The one, as we have seen, merely supplements the general equity jurisdiction of the court, no provision being made therein for a statutory judgment. If the proposition under discussion affected this and similar cases, no judgment could be rendered at all. The other not only gives the right of action, but provides the procedure to be followed, including the judgment to be rendered, and being by its terms not cumulative, it is exclusive, upon familiar principles often proclaimed by this court. *May v. Black,* 77 Wis. 101, 45 N. W. 949; *Finney v. Guy,* 106 Wis. 256, 265, 82 N. W. 595; *Pollard v. Bailey,* 20 Wall. 520; *Fourth Nat. Bank v. Francklyn,* 120 U. S. 747, 7 Sup. Ct. 757; *Huntington v. Attrill,* 146 U. S. 657, 13 Sup. Ct. 224; *Patterson v. Lynde,* 112 Ill. 196. Of course, if one confuses an action to dissolve a corporation with one to administer the property of an insolvent corporation as a trust fund for the benefit of its

creditors, he will very readily fall into the error that a winding-up action, using the term with reference to the rights of creditors being primary, is a statutory action in all respects, and that the warrant for every step therein must be found in the statutes. There seems to be no need for such confusion, since it would be impossible to conduct such an action wholly according to specific statutory guides. Such an action is statutory only in that the statute indicates by implication that a suit in equity, covering all the matters directly and incidentally material to the interests of creditors, is the remedy to be resorted to. The statute contains no complete system on the subject in any other sense, nor anything approaching one, and the practice of the court since *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57, has always been in harmony with this idea.

We are referred to the principle that no creditor in a winding-up proceeding has a right to proceed against the receiver to obtain any part of the property in the custody of the law till it has been duly awarded to him by the order of distribution. True, but this is not an action of that kind. It is one to accumulate *in custodia legis,* in the form of money, the assets properly belonging to the trust fund, so that an order of distribution may be made. An action to enforce a trust so as to put the court in possession of the trust fund is one thing; and an action by a *cestui que trust* to obtain an equitable proportion of such trust fund is quite another.

The point is suggested that the creditors could not properly maintain this action because the legal title to the property recoverable is not in them. In support of that numerous decisions of the federal courts are mentioned, holding that where an assignee in bankruptcy has been appointed, creditors cannot, during the pendency of the trust or after it has been closed, maintain an action to recover any liability for the benefit of creditors; that all such liabilities must

be realized and distributed through the medium of the assignee in whom the title thereto vests. We are unable to see how such cases have anything to do with this class of cases. The procedure referred to is governed by the terms of the bankruptcy statute as construed by the federal courts. The procedure in this class of cases is governed by the general principles of equity jurisprudence, supplemented by such aids as the statute affords in the administration of a trust and the marshalling of all assets, whether at the time of the institution of the suit under the control of the corporation, or whether equitable or legal, possessed by persons in the capacity of trustees in any sense for creditors. The practice in respect thereto is entirely different from that under the national bankruptcy act. The creditors' action reaches directly all assets of the nature referred to, not because they have any legal right thereto, but because they have an equitable right with an appropriate equitable remedy to enforce the same to the extent of reducing the possession thereof to that of the court for the satisfaction of their claims.

Many propositions are presented for consideration upon the theory that the property, whether consisting of tangible things or the mere personal liability of parties who have wrongfully converted the tangible property to their own use, or otherwise wrongfully lost it, must necessarily be recovered by a receiver. That is a mistake. When the situation presented is that of a trustee who has squandered the trust property, and the *cestui que trust* only desires to make him account in money for the loss, an action for such accounting may be maintained in equity without any receiver. A receiver is necessary only where there is property to be protected and administered pending the suit, or to be taken possession of and converted into money in administering a trust, or there are wrongs which cannot be remedied without one. At the time this suit was reorganized and again made active, the trust property, as alleged in the complaint, had all been

wrongfully lost in one way and another. As to the greater part of it, the only recourse for creditors was to hold the wrongdoers to their liability to account and make compensation for the loss they had caused. The only way to encompass the whole situation in one suit was by a proceeding of some sort in the one pending. It did not take a receiver to give the court jurisdiction of the subject matter. None was needed, because there was no property in the custody of the court, and none to come into such possession other than in the form of money as a result of the accounting and submission to the commands of the court. Where only an accounting is required, a receiver is never deemed necessary. High, Receivers, §§ 34, 35. There are many instances in the books of creditors' bills to enforce such liabilities without the use of a receiver. Of course, from the very nature of the remedy, no receiver can well be used till there is something to receive. *Gores v. Day,* 99 Wis. 276, 74 N. W. 787; *Gores v. Murphy,* 109 Wis. 408, 84 N W. 867, 85 N. W. 411; *Schenck v. Ingraham,* 5 Hun, 397; *Chicago & A. B. Co. v. Fowler,* 55 Kan. 17, 39 Pac. 727. In *Gores v. Day,* because there was an assignee, he was said to be a necessary party; but the maintenance of the action in the right of the creditors was sustained both under the statute and independently thereof. The common practice in creditors' actions, so far as relates to those holding property forming the subject of the trust or some part thereof as trustees, in a capacity hostile to the creditors or otherwise, is to charge them as defendants, making no use of a receiver, necessarily, till one is needed to hold property as the agent of the court. It will be remembered that in *Clapp v. Clapp,* 7 N. Y. Supp. 495, it was in effect held that if there was not a receiver standing as the representative of creditors as to property once *in custodia legis* and lost by the wrongdoing of the court's agent, such agent could be compelled to account directly to the creditors at the instance

of the injured beneficiaries, and made to compensate them directly for the amount of their loss.

It is said that the statutory action cannot be regarded as in any respect a suit commenced by creditors' bill in analogy to the old equity practice, nor as a modification of it. The only authority cited in support of that is *Clarke v. Banner & V. P. Co.* 50 Wis. 416, 7 N. W. 309. As we have seen, so far as it bears on counsel's point it was wrongly decided and was in effect overruled in *Hurlbut v. Marshall,* 62 Wis. 590, 22 N. W. 852, and subsequent cases. Further, as we have shown, the manner of administering the property of an insolvent corporation is not by a statutory action in any other sense than that it is by an equitable action with the ordinary incidents of such actions, supplemented by whatever aids the statute affords. That was early held in *Mann v. Pentz,* 3 N. Y. 415, which was followed here in *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57. The same authorities hold that the complaint in such an action is to all intents and purposes a creditors' bill. The authorities generally maintain that view.

"It has become the settled law of this country that the assets of an insolvent corporation constitute a trust fund for the payment of its debts. . . . A creditor's remedy, by creditor's bill, or proceeding in the nature of a creditor's bill, against a corporation, its officers and stockholders, is firmly established." Smith, Eq. Rem. of Cred. § 29.

To the same effect is *Ballin v. Loeb,* 78 Wis. 404, 47 N. W. 516. The action was there called a statutory action, merely in the sense, however, that the sections of the statute for the administration of the assets of an insolvent corporation require that it shall constitute the subject matter of one suit to be commenced and carried on according to principles of equity. It seems almost a waste of energy to pursue this subject, as the authorities are uniform against counsel's proposition. When we speak of a creditors' bill

under the Code, we mean, of course, the Code substitute for the common-law pleading. It is only mere forms of action that are abolished by the Code. The substance survives. In place of the bill in equity of the old practice, we have the complaint in the civil action of the Code. Where the pleading is in an action to redress a wrong such as formerly was the subject of a suit in equity commenced by creditors' bill, we often speak of it by its old name. The better way would be to speak of it as a complaint in the nature of a creditors' bill, so as not to lose sight of the fact that the Code, so far as forms of action are concerned, is a complete substitute for the old system, while so far as the real substance of things is concerned it remains substantially as before. *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776; *Crowns v. Forest L. Co.* 102 Wis. 97, 99, 78 N. W. 433. The prime essential of a creditors' suit is the exhaustion of legal remedies. *Northwestern I. Co. v. Central T. Co.* 90 Wis. 570, 63 N. W. 752, 64 N. W. 323; *Hughes v. Hunner,* 91 Wis. 116, 120, 64 N. W. 887. A proceeding by a judgment debtor, after the return of an execution upon his judgment unsatisfied, to charge the unleviable property of an insolvent corporation with the payment of its debts and to wind up its business affairs as regards creditors, satisfies that essential and is probably the most common of any way of doing so in modern practice where equity jurisdiction is resorted to as formerly, respecting the remedy by creditors' bill, but by the new form of action created by the Code. The pleading is a creditors' bill, strictly so called, but under the Code name for the plaintiff's first pleading. Speaking on the general subject of creditors' bills, in 5 Ency. Pl. & Pr. 395, the author uses this language:

"A class of creditors' bills constantly increasing in frequency, comprises bills brought by creditors of insolvent corporations for a ratable distribution of their assets, to reach property that has been misappropriated and misapplied, or to

collect for the benefit of creditors unpaid stock subscriptions."

So it is plain that the claim of counsel that it was not proper practice to bring in the new defendants and litigate the matters as to them, alleged in the complaint, in the manner common in suits in equity commenced by a general creditors' bill, cannot be sustained.

But, say counsel, it is not permissible to bring in, by a supplemental complaint, a subject matter not existing at the commencement of the action. The answer to that is that no such subject was so brought in, in this case. The new matter was germane to and formed a part of the original subject. It is only new matter, constituting a new and independent cause of action, that is necessarily excluded from a supplemental bill. That is the rule of the old practice (21 Ency. Pl. & Pr. 28), and it is preserved by sec. 2687 of the Code in the following language:

"The plaintiff and defendant, respectively, may be allowed, on motion and on such terms as may be just, to make a supplemental complaint, answer, or reply alleging facts material to the case occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made."

The restriction thus indicated has always been distinctly recognized in the decisions of this court. *Noonan v. Orton,* 21 Wis. 283, 293; *Ely v. Wilcox,* 26 Wis. 91; *Orton v. Noonan,* 29 Wis. 541, 544; *Orton v. Noonan,* 30 Wis. 611, 613. The general practice in creditors' actions, to reach the property under the control of an insolvent corporation, and other property, tangible and intangible, proper to be deemed parts of the trust fund for the payment of the corporate creditors, is to commence the same in a simple form. Great diligence, as a rule, is required in the initiatory step in order to effect an equitable levy upon the corporate assets before they can be dissipated or become incumbered.

Danger in those respects having been guarded against, upon those interested primarily in the success of the litigation becoming conversant with the full scope of the subject proper to be brought into the action, it is customary, with or without permission of the court, as the situation of the case may require, to serve an amended and supplemental complaint covering the entire field as it existed at the time of the commencement of the action and as enlarged by subsequent events. That has been repeatedly sanctioned by this court. The extent to which a complaint may thus be broadened out, the location of the original parties upon the record be changed, and the way new ones may be placed, so that, so far as practicable, those united in interest as creditors to work out the trust, may appear as plaintiffs and all adverse parties appear as defendants, is well illustrated in *Hurlbut v. Marshall,* 62 Wis. 590, 22 N. W. 852; *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922; and *Boyd v. Mut. F. Asso,* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171. The practice elsewhere, under systems similar to ours, is the same, and is indicated by the treatment of the subject in the able opinion by MITCHELL, J., in *Arthur v. Willius,* 44 Minn. 409, 412, 46 N. W. 851:

"'It is an action not proceeding in the ordinary way of actions at law by trial of simple issues, judgment, and execution, but by the exercise of powers peculiar to the former courts of chancery.' The proceedings are susceptible of being molded into almost any form necessary to accomplish their purpose of securing a full and final adjustment of the rights and liabilities of all parties growing out of the corporate business. During the progress of the proceedings new parties may be admitted or brought in, and new issues introduced from time to time, as they become necessary for the final winding up of the affairs of the corporation, and the enforcement of all the rights of creditors. The original complaint need not state more than a case for the sequestration of the corporate assets. Neither stockholders, directors, nor creditors (save the one who institutes the suit), need be

made parties in the first instance. Other creditors may subsequently come in or be brought in. Stockholders and directors may also be brought in for the purpose of enforcing their individual liability. This may be done at the instance or upon the complaint of any creditor who has become a party to the proceedings. In short, the proceedings are intended to be so elastic as to be susceptible of development during their successive stages of progress, as to reach not only all the corporate assets, but also all liabilities of stockholders and others so far as necessary for the payment of creditors."

The conclusion on this point must be that there is nothing subject to criticism in the practice adopted here, unless the fact that, though enforcing the liability of the receiver and his associates in wrongfully wasting or converting its property to their own use as alleged, is germane to the original purpose of the suit, the practice in the enforcement of such exceptional liabilities was so prejudicially departed from as to constitute jurisdictional error.

But, it is said, if ch. 140, Stats. 1898, does not permit such an action as this, no other statute does, hence it cannot be maintained. In support of that counsel points (a) to the doctrine that the Code is a complete substitute for common-law forms of action and procedure both at law and in equity, and that it furnishes no form for a complaint or a judgment to fit this case; (b) that a cause of action not existing at the time of the commencement of the action cannot be brought in by amendment or supplemental complaint; (c) that the new cause of action here does not affect all the parties, hence is not joinable with the original cause of action; (d) that the defect of misjoinder is not waived by not objecting on that ground; and (e) that the statutes, secs. 3217 to 3245, provide a form for a final order and a judgment, but that the former was not followed and the latter does not fit this case. Assuming, as we must, that all of such propositions are supposed by counsel to have merit in respect to

the controversy to be solved, we will consider them seriously.

a. True, the Code is a complete system. It took a long time for the bench and bar to thoroughly appreciate that; and it would now be a misfortune to say anything or render any decision which would cast a shadow of doubt upon it. But in order to maintain the integrity of the new system we must not confuse it with matters that have nothing to do therewith. Much difficulty has been experienced since the inception of the reformed procedure in New York, by confusing the term "remedy," as used in the statutes, with "procedure," forms of action with the substance thereof, and procedure, as regards statutory essentials, with mere details of practice. In a strict statutory sense there are but two remedies known to our system to protect any right or redress any wrong. They are denominated "actions" and "special proceedings." Sec. 2954, Stats. 1898. Every ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, is an action. Sec. 2595, Id. Every other remedy is a special proceeding. Sec. 2596. Every action for the enforcement or protection of private rights or the redress or prevention of private wrongs is a civil action. The distinction between actions at law and suits in equity, and the forms of such actions and suits, have been abolished. Sec. 2600. The persons having an interest in the subject of the action and in obtaining the relief demanded, other than in exceptional cases, are plaintiffs and joinable as such. Sec. 2602. All persons claiming an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the question involved, may be defendants. Sec. 2603. The first pleading in the case is denominated the "complaint," its general features only being prescribed by statute. The central idea thereof is that it must deal only with facts constituting the

cause of action. Sec. 2646. The general features, only, of the judgment to be rendered are prescribed by statute. Sec. 2883 *et seq.* The Code, other than in exceptional cases, furnishes no form, strictly so called, either for the complaint or the judgment. The general requisites of both are pointed out, and fit a winding-up action as well as a simple action to recover upon a promissory note.

b and c. These we have answered. The error of counsel is in assuming that the new matter brought in constitutes a new subject of action. It was a part only of the original subject matter.

d. We cannot agree with counsel that a misjoinder of causes of action is not a subject of waiver. They overlook the fact that sec. 2649 of the Code expressly provides that improper union of causes of action is ground for demurrer, and that sec. 2654 expressly provides that a failure to object to such joinder in the manner pointed out by the statute waives the question.

e. True, where the Code furnishes a form for a judgment which is, expressly or by implication, exclusive, that form must be followed. But there is nothing in sec. 3217, or in sec. 3245, condemning the judgment here under that rule, or condemning the procedure calling for such judgment, as prejudicial error or error at all. Sec. 3217 does not deal with the matter of a judgment, but with an order closing a special proceeding instituted in an action where legal remedies for the collection of the judgment therein shall have been exhausted or an administrative order executed after a judgment rendered in an independent action. Sec. 3245 has no reference to an action of this kind at all. It refers only to proceedings to dissolve corporations. An action to that end is in every sense statutory, and of course statutory requisites of the judgment must be followed.

This is stated for consideration: The recoveries against the receiver and his alleged guilty associates should be re-

versed because (a) the statute does not authorize them; (b) the proceeding is entirely unwarranted; (c) the complaint does not support them; (d) the receiver cannot be charged in an incidental proceeding with liability for loss wrongfully caused or permitted by him.

a. This has already been answered. The statute does not prohibit redressing the wrongs in the manner resorted to. It indicates that a proceeding in the nature of a creditors' bill is the proper proceeding. It may add to, but does not take from, what might be brought into the action upon the general principles of equity jurisprudence. Those principles include making the liabilities of the parties available for creditors in the winding-up suit. Whether the particular manner of accomplishing that adopted here was within the discretionary power of the court is the only question left.

b. Counsel base this on *Stahl v. Gotzenberger,* 45 Wis. 121, where a statutory action—one to foreclose a mortgage, but with incidents showing that the trial was necessarily by the court—was tried before a jury and a judgment was entered by the clerk without the court's passing on the issues involved or even directing the entry of the judgment. Of course it has no relevancy whatever to the question to be determined here.

c. This is based on *Reynolds v. Stockton,* 140 U. S. 254, 11 Sup. Ct. 773, where, in a creditors' action commenced in New York to reach property in the possession of a receiver, and upon a complaint limited in its scope thereto, a judgment was rendered as if the action were brought to reach that and property in the hands of a receiver in an adjoining state as well. We are utterly unable to see any analogy between that and the case in hand. The judgment here is responsive to the complaint in every particular.

d. This is based on *Mechanics' Nat. Bank v. Landauer,* 68 Wis. 44, 31 N. W. 160. That relates to an independent action against a receiver. Counsel used the term "incidental

proceeding." "Independent action" would have been more appropriate; as the one used tends to give a wrong idea of the case cited. The authority is in harmony with others cited in the course of this opinion, that a receiver may be made to account for loss sustained by creditors through his unfaithfulness, and that the manner of the accounting is within the absolute control of the court appointing him to the extent of sound judicial discretion, and that circumstances may justify even an independent action against the receiver. These words are quoted with approval from High, Receivers:

"The more common practice, and that which has been generally commended by the courts, is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed, without remitting the parties to a new and independent suit; and it rests wholly within the discretion of the court to grant leave to bring an independent action against its receiver, or to determine the controversy upon petition in the original cause, directing, if necessary, an issue to be tried by a jury as to questions of fact or of damages." Sec. 254*b*.

The point is made that in no event can a receiver and his alleged guilty associates be legitimately charged in an equitable action with any greater liability than to respond, each for himself, for the amount of the trust property he received. That has very little, if anything, to do with the subject of jurisdiction. We say this in passing to prevent any misconception as to why it is noticed that counsel make the point. The charge in the complaint is that such alleged guilty parties fraudulently colluded together to appropriate to their own use the trust fund, and consummated their purpose. The facts found support the charge and specify the amount in money so lost to the creditors. The judgment is based, as to them, upon their joint participation in the wrong. In such circumstances all are liable as constructive cotrustees, and may be made to account in an equitable action. Every person who, through fraud of which he is guilty or has guilty

knowledge, obtains property of another, equity will convert into a trustee for such other and deal with him in many respects the same in redressing the wrong to such other as if he were a trustee of an express trust. 1 Perry, Trusts, §§ 166, 167. When the fraud is perpetrated by several acting in concert, all are equally trustees and are jointly liable. Neither can escape any part of the liability because of the fact that his co-conspirator was the real beneficiary. The property received by each is deemed to have been received by all, and to constitute the subject of a single trust, with all the liabilities incident to the trust relation. *Fountain S. P. Co. v. Roberts,* 92 Wis. 345, 66 N. W. 399; *Pittsburg M. Co. v. Spooner,* 74 Wis. 307, 42 N. W. 259; *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Hebgen v. Koeffler,* 97 Wis. 313, 72 N. W. 745. This subject, for the purpose of orderly treatment of the appeals, might better have been reserved for another branch thereof,—that which merely concerns whether the proper judgments were rendered.

The practice adopted violates the right of trial by jury, say the learned counsel. This is based upon two erroneous assumptions: (a) that the right to a sequestration remedy is a right of action; (b) that a statutory action is necessarily an action at law within the constitutional guaranty. The right of sequestration, as we have seen, is a mere right to a special proceeding in an action. A statutory action may or may not be an action at law according as the statutory incidents conform to one or the other from a common-law standpoint. *Willer v. Bergenthal,* 50 Wis. 474, 7 N. W. 352; *Bentley v. Davidson,* 74 Wis. 420, 43 N. W. 139. The only right of trial by jury guaranteed by the constitution is the right as enjoyed at the time the constitution was adopted. There is no such right as regards a statutory action unless such action is coupled with statutory incidents indicating that it is strictly legal in character, or the remedy of trial by jury

is expressly given by the statute. There is no such thing as the right of trial by jury in such a case as this, because the action is not statutory in any sense, because all the statutory incidents of the action indicate that it is strictly of equitable cognizance, and further, because it is strictly an equitable action with statutory aids, and cannot properly be called a statutory action at all in any other sense than that the statutes, as the court has frequently held, indicate, as plainly as if they contained an express declaration on the subject, that the action is of the nature known only to courts of equity under the old system, to enforce a trust for the benefit of creditors; and because, if it were otherwise, there is no suggestion in the statute of any right of trial by jury as to any of the issues, and all the statutory incidents point to an action in equity as the only one that will encompass the whole situation. We must say in passing that we treat this feature of counsel's argument only because it is suggested. It is the first time, so far as any indications in the books show, that a court has been called upon to declare that there is no such thing as a constitutional right of trial by jury in an action to marshal the assets of an insolvent corporation into a fund for the benefit of its creditors.

Respondents' counsel suggest that it was proper to bring R. E. Rust and all the officers of the corporation into the litigation, and T. F. Frawley as well, both under the statute and independently thereof, by reason of what was alleged on good ground to have occurred before the receivership commenced, and which, though not found in all respects as alleged, was to such an extent as to warrant the court in retaining the case as to all of them and to redress the wrong of which they were guilty as alleged, committed before as well as after the suit was commenced. That is entitled to a prominent place in our considerations. It gives to the situation to be dealt with an aspect not necessarily involving at all the question of whether a receiver, fairly appointed in a

winding-up action, and those thereafter colluding with him in wasting the trust fund placed in his charge, may be brought into such action as defendants and made to account as such for their wrongdoing.

It is alleged in the complaint that as early as January 1, 1893, the directors of the corporation, which included substantially all of the appellants except T. F. Frawley, alleged to have been guilty participants with Rust, receiver, in the wrongs committed by him as such, as alleged, knew that the corporation must necessarily go into liquidation, and that they then entered into an agreement between themselves to divert the corporate assets from their proper channel,—that of a trust fund for the creditors of the corporation,—to their own benefit, and that all the steps thereafter taken, which resulted in accomplishing that end, including the commencement of this action and the appointment of Rust as receiver, were but steps in the execution of the fraudulent agreement entered into. It is further alleged that T. F. Frawley thereafter, with full knowledge of all the facts, became a co-conspirator with the others. The claim of the respondents, so alleged, is consistent with the findings, with this exception: The date of the fraudulent agreement is placed between May 15 and May 18, 1893. It is sufficient for this discussion to say that the agreement was found to have been entered into before the commencement of the action, and that all of the wrongs for which redress is adjudged are found to have been committed in execution thereof. "The receivership," the court found, "from its inception on May 23, 1893, to its close on December 30, 1897, was managed by said receiver, and by his attorney, T. F. Frawley, and his counsel, H. H. Hayden, for the sole interest and benefit of the said receiver and said attorney and counsel and said *Geo. T. Thompson, Fitch Gilbert,* and the said corporation, the *Chippewa Valley Bank,* in pursuance of said conspiracy to unlawfully appropriate the assets of said defendant company for the benefit

of said parties above named against the interests and rights of the general creditors of the said defendant, the National Electric Manufacturing Company." We have nothing to do at this point with the question of whether that severe indictment of the appellants is borne out by the evidence. That will come later. It has nothing to do with the jurisdiction of the court to entertain the case as it did. If it be true that the court was defrauded into selecting Rust as its receiver, and that the scheme of appellants, entered into and carried out, was as alleged, then the effect thereof, as contemplated and in fact, was to leave the property of the corporation more completely under the control of its officers than it would have been had no receiver been appointed, and the receiver and his attorneys and counselors, the active participants in the fraud, cannot be considered in any other light than as agents of the corporation or of its officers. Under the forms of law, according to the complaint and the findings, the court was used as a shield to protect the officers of the corporation and their attorneys from hostile attack, while they proceeded at their leisure to put the assets of the corporation into their own pockets. Can it be possible that such things can be done in such a way, and yet the court that has been imposed upon is powerless, responding to the appeals of creditors upon whom the loss has fallen, to treat the wrongdoers so mildly as to make them defendants in the suit commenced ostensibly for the benefit of creditors, and compel them to account the same as if no receiver had been appointed? Is it true, as claimed, that in such a suit as this the court can be imposed upon and made unconsciously to be the very source of power to commit a great wrong to creditors, and yet the order obtained by means of the imposition have such efficacy that when the whole scheme is exposed *prima facie* to the view of the court, showing that it had its inception before the action was commenced, and that such action was a step in the execution thereof, the fraudulent receiver can successfully

claim to have rights by reason of his office, entitling him to such a measure of protection at the hands of the court that, with all the vast power it is said to possess, it cannot, if it sees fit, make him account in the manner adopted here, or, if necessary, treat the whole receivership proceeding as a mere means of enabling the officers of the corporation to handle its property regardless of the rights of those equitably entitled thereto, and as such so far void that all parties concerned are accountable as defendants the same as if the receivership order had never been made? If a court, in an action commenced and pending before it, cannot treat an order, obtained, as the complaint alleges and the trial court found the one appointing Rust receiver was, and those obtained by him, alleged and found to have been fraudulently secured in the execution of a wicked purpose, as at least so far void as to warrant making the guilty persons parties defendant in the action, either as original wrongdoers or as an efficient way of trying the issues in respect to the charges made against them, then the elementary principle that fraud vitiates everything, rendering that into which it enters void or voidable, and the doctrine that a court with full chancery jurisdiction may compel its receiver to account to such persons and in such manner and at such times as in the exercise of sound judicial discretion it may deem best, must have a very important exception.

In *Schenck v. Ingraham,* 5 Hun, 397, which we have before alluded to, where the receiver and his attorneys converted the trust fund to their own use very much as it is said the receiver and his attorneys did in this case, it was held that upon the facts being established showing that the orders in question were obtained by fraud upon the court and in fraud of creditors, it was the "duty of the court to disregard them as a mere device or fraud, invented for misappropriating what justice required should be paid to the creditors of the firm whose affairs it was the object of the action to settle." The claim was made in that case, as here, that the order

of the court furnished the receiver and his co-conspirators some measure of protection, and to that the court said:

"The object of the law in allowing the court to take it in charge, was to prevent it from being wasted, destroyed, or squandered, in order that a proper disposition of its proceeds could be made among the persons having lawful claims upon them. That has been completely frustrated and defeated in the present instance. The fund designed for creditors and others interested in the property producing it, in this instance, has been entirely exhausted by the claims allowed to the receiver and his counsel, and it is confidently claimed that this court shall, after all that has been done, maintain the proceedings as valid through which that has been accomplished. A result of that character would justly involve the administration of the law in the most unqualified and deserved condemnation. For, under the forms of law, it would protect and sanction the most apparent injustice. No lapse of time less than that prescribed for the commencement of actions would either justify or excuse the court for a failure to vacate and annul proceedings which appear to have been resorted to as, and successfully rendered, the means of such transparent injustice. Its power in this respect is ample, and it would be unworthy of the name of a court of justice if this distribution of the property put into the hands of its officer for preservation and protection should be permitted to stand."

It will sufficiently appear by the language quoted, that the holding was that the order obtained by a fraud upon the court was utterly void; that it was subject to be regarded as of no force whatever if properly challenged at any time within the period of the statute of limitations.

Looking only to the charges made against the appellants in the complaint and the findings in support thereof, the quoted language applies very fittingly here. If the findings are borne out by the evidence, then the property of the corporation never really passed out from under the control of its officers and their attorneys, except as it was divided up between them as private property. The office of receiver was

a mere cover behind which, in fancied security, such officers and attorneys, those who conspired together to defraud the creditors before the action was commenced, at a time when they were responsible to the creditors as trustees of the corporate property, used up the trust fund for their private benefit. It would seem that, upon the most familiar principles of equity jurisprudence, the court having jurisdiction of the parties and the subject matter could deal with such a situation as if the order obtained by fraud upon it were entirely effaced from the record, so far as operating to any extent to protect the guilty parties. If that be not so, then the tribunal supposed to be the embodiment of the accumulated wisdom of ages, and possessing jurisdiction greater than any other earthly tribunal ever created to the end that justice might prevail between man and man, may, by cunning and selfishness, be made the most efficient means of defeating justice, the court being induced, unconsciously, to tie its own hands, rendering fraud within the very temple of equity, in the very case in hand, a bar to its administration. We cannot indorse that doctrine.

In justice to the learned counsel for appellants, to whose industry and professional acumen we owe much, enabling us to elucidate the question submitted for reargument, we acquit them, as does the learned counsel for respondents, of at least making prominent in defense of their clients any claim that they can shield themselves behind the office of receiver, if the findings of the court are borne out by the evidence that the whole proceedings which resulted in the wrongs complained of were but the means resorted to to carry out a fraudulent conspiracy to defeat the rights of the creditors of the corporation, entered into before the action was commenced. True, one of the counsel argues that Mr. Frawley was not properly made a party defendant because he was never an officer of the corporation, and that the act making him a party was jurisdictional error because the action was statutory and be-

cause there is no provision in the statute for making other persons parties than officers. But other counsel appear to admit, inferentially, that Mr. Frawley was properly made a party if he was a participant in executing a fraudulent conspiracy to defraud creditors, entered into before the action was commenced. As we have before seen, the fact that he was not an officer of the corporation makes no difference with the power of the court in respect to him, if he in fact was a constructive trustee for creditors, of some part of the trust fund, as in effect alleged. Of course, all officers, and all colluding with them to defraud creditors before the action was commenced, were proper parties under sec. 3227, and on general principles of equity, as has been uniformly held in this class of cases, and as we have heretofore seen. In addition to the authorities we have heretofore cited to that, we will name the following, some of which are aptly referred to in the brief of the learned counsel for respondents: *Powers v. Hamilton P. Co.* 60 Wis. 23, 18 N. W. 20; *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 443, 81 N. W. 675; *Proctor v. Sidney S., B. & F. Co.* 8 App. Div. 42, 40 N. Y. Supp. 454, 456; *Cummings v. Am. G. & S. Co.* 87 Hun, 598, 34 N. Y. Supp. 541; *Wood v. Sidney S., B. & F. Co.* 92 Hun, 22, 37 N. Y. Supp. 885; *Reed v. Stryker,* 4 Abb. Dec. 26; *Randolph v. Daly,* 16 N. J. Eq. 313; *Burns v. Beck & G. H. Co.* 83 Ga. 471, 10 S. E. 121. A few quotations from the cited cases will emphasize what has been said. This from the opinion of PUTNAM, J., in *Proctor v. Sidney S., B. & F. Co.,* is in harmony with judicial expressions generally on the subject:

"I am inclined, therefore, to believe that this action, the object of which is to reach corporate assets, was properly brought, not only against the corporation, but also against those parties who have such corporate assets in their possession; that the complaint, which joined the corporation with those who had illegally obtained its property, claiming to recover that property for the benefit of creditors, contained but

a single cause of action; that the well-settled principles applicable to a creditor's suit against an individual should be deemed to apply to this creditor's action against a corporation."

Wood v. Sidney S., B. & F. Co. was a creditor's action in which there was a claim that the debtor's property had been placed beyond the reach of the creditors pursuant to a fraudulent scheme. All parties concerned in the alleged wrongful transaction were made defendants. The court said in respect to the complaint:

"The unlawful transfer, both through the sales under the judgments and the sale to Brooks, is treated as an act done in pursuance of one scheme, and the complaint is framed upon the theory that in equity a right existed on behalf of the plaintiffs to have anything that was done in pursuance of that scheme adjudged fraudulent and void, and to require all those who had received any property through it to account for the amount so received. All persons are therefore made parties who did in any manner participate in such transaction, and received anything through it."

In *Reed v. Stryker,* the court said in respect to an analogous transaction, quoting with approval from a previously decided case:

"The general right claimed by the bill is a due application of the property of John Fellows to the payment of the judgment. The subject of the bill and of the relief, and the only matter in litigation, is the fraud charged in the management and disposition of that property, and in which charge all the defendants are implicated, though in different degrees and proportions. The defendants, therefore, have one common interest among them all, centering in the point in issue in the cause; and different matters of different natures are not demanded by the bill. It is one matter."

The court further said, quoting from Chancellor KENT, in *Brinkerhoff v. Brown,* 6 Johns. Ch. 139:

"There was a series of acts on the part of the persons concerned in this company, all produced by the same fraudulent intent, and terminating in the deception and injury of the

plaintiffs. The defendants performed different parts in the same drama; but it was still one piece—one entire performance, marked by different scenes."

The importance of the feature of this case, upon the complaint and findings, in determining the question under consideration, that Rust, receiver, was, though ostensibly the hand of the court, in fact the hand of the officers of the corporation defendant, and that Mr. Hayden and Mr. Frawley, though ostensibly the attorney and counsel of the court's officer, were in reality in that capacity for the officers of the corporation, justifies us in some further discussion of it.

The conception of a receiver is some one to take manual possession, for the court, of property,—to take it out from the possession of others and hold it for the better security of those who may be ultimately entitled thereto. The proceedings are in their very nature adversary to those holding the property and controlling it at the time of the appointment. When the receiver acts, in a legal sense the court acts. It reaches out "its arm" so to speak, and does the work requiring physical action, directed by business judgment, by using that of its officer. Now when such officer secures his appointment in the interests of those as to whom, in form, the proceedings are adversary, by imposing upon the court; when he acts in form for the court but in fact by a preconceived plan for the very persons from the possession and control of whom the property involved was designed to be removed; when by reason of the fraud the officers of the corporation, as in this case alleged and found, instead of being ousted from the control of its property by an equitable levy for the benefit of creditors in the only way the court could accomplish that, judicial instrumentalities are turned into mere means of enabling the officers of the corporation, through their agent, in greater security than before, to control the corporate assets for their own benefit:—it seems that the receiver has no status whatever as an agent of the court; that his real position is

that of an agent for the guilty parties who secured his appointment; and that his possession is but a continuation of their possession. If there were no authorities to guide us on that, it would seem, on principle, that there would be no escaping the conclusion indicated. But we are not entirely without guides. The fact that there are but few does not cause doubt in our minds upon the soundness of the doctrine. It rather indicates that the instances are rare where any such imposition upon creditors and the court, as is alleged and found here, was successfully attempted, and perhaps still more rare where it has been exposed.

In *Taber v. Royal Ins. Co.* 124 Ala. 681, 26 South. 252, the court had to deal, in a creditor's action, with an action previously commenced, in which a receiver was appointed as a result of collusive proceedings. It was said most emphatically that there can be but one administration of a trust fund, and that the court having, by the legitimate appointment of a receiver, really taken to itself such fund, other proceedings interfering therewith were necessarily superseded. But it was held that the appointment of the first receiver, ostensibly as the agent of the court but really as the agent of those already in possession of the trust fund, was not the commencement of an administrative proceeding by a court in any legitimate sense, and a real taking of the trust fund into its possession for that purpose; that the property in the hands of such receiver should be deemed not to be in the possession of the court, but in the possession of the corporation through its agent. The receiver was so treated, the court saying of the situation, this:

"We dismiss the consideration of the previous suit commenced by the absconding officers of the company, in which a receiver was improvidently appointed by the court, as having no bearing whatever in this case. It was collusive and fraudulent, and never amounted to a *lis pendens* in behalf of creditors, nor was there any administrative decree rendered therein. . . . Though a receiver was nominally appointed,

his position could amount to nothing more than a custodian introduced by the corporation itself."

The supreme court of Texas had occasion to speak of the same subject in *Texas & P. R. Co. v. Gay,* 86 Tex. 571, 605, 26 S. W. 599, 613, and did so in these words:

"The theory on which a receiver is held to be an officer of the court appointing him, and not the agent of the owner, whose property is placed in his possession, is that the property to be controlled is taken from the custody and management of its owner and made subject to the control of the court without his consent; but when the defendant owner asks the court to do this, he, in effect, asks the court to make an appointment for him, and it is but just that a receiver so appointed should be held to be his agent.

"That a plaintiff collusively acts with a defendant for such a purpose only aggravates the case; for this enables the owner to impose upon the court, and such plaintiff has no ground for complaint if the receiver be held the agent of the owner in reference to every act out of which, in the management of the property, obligations to other persons may arise."

That doctrine seems so reasonable and so in accord with principle, that we venture to say no court or reputable text-writer can be found to have said anything to the contrary. We find an express adoption of such doctrine in Beach, Receivers, §§ 206, 384; and find it referred to significantly in 23 Am. & Eng. Ency. of Law (2d ed.) 1040, subd. 10.

In view of the last foregoing discussion, the point made by respondents' counsel, that it is expressly given to the court, if the power does not otherwise exist, by sec. 3239, Stats. 1898, to direct the liabilities sought to be enforced in this litigation to be treated as they were, is not without force. Sec. 3237 provides that:

"The circuit court shall have jurisdiction over directors, managers, trustees and other officers of corporations: to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge; . . . to compel payment by them to the cor-

poration whom they represent and to its creditors of all sums of money and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees or other officers;" and "to set aside all alienations of property made by the directors, trustees or other officers of any corporation contrary to the provisions of law or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving such alienation knew the purposes for which it was made."

Sec. 3239, Id., provides that jurisdiction to do all those things "shall be exercised in an action . . . by any creditor of such corporation" if the case may require it or the court so direct. Here R. E. Rust, as alleged by respondents and found by the court, was introduced into this litigation by fraud, to act as the agent of the corporation and its officers, and did so act, with the results complained of. If that be true, then the misappropriation of the trust property was to all intents and purposes the act of such persons, their agents, and other guilty participants, the same as if the semblance of a possession of such property by the court were entirely out of the case. That would present a plain case within the statute, authorizing the court to take jurisdiction of the matter at the suit of the injured creditors. The language of the statute is significant in that it is to the effect that the jurisdiction shall be exercised by either of several persons named, including creditors, as may be necessary or as the court may direct. It has heretofore been suggested that in so far as authority to instigate a suit of this nature is indicated by the statute it is a mere declaration of the common law. *Gores v. Day,* 99 Wis. 276, 74 N. W. 787. To that we adhere. If there is any significance in the words of the statute, "as the case may require or as the court may direct," it is in the indication that the court has absolute authority within the boundaries of judicial discretion, to determine who shall represent as plaintiffs the per-

sons primarily interested in redressing the wrongs referred to in sec. 3237. The courts have uniformly exercised that discretion, as we have before seen, to the extent of entirely rearranging the parties to the record in suits of this kind, making those who instituted the suit defendants, and substituting new parties as plaintiffs. The court exercised the same discretionary power here; and that brings us back to the point at which we have several times arrived: Whether the court committed jurisdictional error or not depends upon whether discretionary power was abused, and under the circumstances of this case so abused that, after a trial upon the merits, this court should say that jurisdiction of the subject matter was not acquired.

We have now been over, point by point, specifically or generally, all except one of the reasons suggested for our consideration of why the practice in this case should be condemned as jurisdictionally infirm. Assuming, as we must, that each reason put forward by the learned counsel for appellants was thought by them to have merit, we have avoided ignoring any one of them, regardless of whether any seemed to us to be without significance. The result is that some subjects have received as careful attention as if the case might turn thereon, which, we must say, are not really open to serious discussion from a judicial standpoint. How best to frame an opinion where a large number of points are presented by able counsel, with supporting authorities supposed to demonstrate the soundness of each and with reasons supposed to make the same applicable to some phase of the case in hand, is not always easy to determine. To consider and decide the vital questions only, which are usually few in number, and brush the rest aside, greatly economizes labor and space and furnishes all that is essential for the final decision to rest upon, and probably satisfies the strict measure of judicial duty; but it is liable sometimes to leave counsel more or less uncertain in mind as to whether their labor to aid the court has been appreciated and their labor to serve their clients not been in

great part wasted, and whether the decision might not have been different had the points treated, apparently, as so unimportant as not to call for more than a mere mention if even that, been carefully examined. Though it has entailed much labor upon the court, the broader method has been adopted in this case, of discussing to some extent every question presented, though it seemed to us in some instances that only elementary principles were involved, or questions not open to controversy in view of previous decisions of the court. Our references have been chiefly to points suggested by appellants' counsel, because that seemed to be the logical way of treating the matter, and because the discussion of appellants' points incidentally covered the grounds upon which respondents claim that an affirmative answer to the court's question should be given. We will now proceed to consider the remaining proposition submitted by appellants' counsel.

We may briefly state counsel's proposition thus: The complicated character a suit may assume, as evidenced by the one before us, in the practice which an affirmative answer to the court's question would establish, indicates the absurdity of such practice and condemns it utterly. Numerous illustrations are given by the learned counsel, of their conception of the practice in these winding-up suits, extended, as it is supposed it would be, in order to cover the matters litigated in this suit. Viewing the practice as counsel treats it, we do not wonder that the exclamation is made: "Can it be claimed that the legislature ever intended such a result!" After all that has been written, endeavoring to make the scope of this class of suits easily determinable, it is evident by the illustrations given by counsel that if this one falls within the rule a very erroneous idea of such scope is yet liable to be entertained by the profession. That suggests further effort to mark the boundaries of the principles involved. This is the result which counsel apprehend might follow stamping the practice in question as proper:

If, subsequent to the commencement of an administration

suit and the sequestration of the assets possessed by or under the control of the debtor, these liabilities should be incurred, the parties responsible could, by supplemental bill, be brought into the litigation and the wrongs redressed:

A tenant of some part of the trust property, liable to an action of unlawful detainer.

A hostile claimant of some part of the land belonging to the trust property, so circumstanced as to be liable under ordinary conditions to an action of ejectment.

A person, so circumstanced, as to land belonging to the trust, as ordinarily to be liable to an action to remove a cloud upon title.

A person takes some part of the trust property under claim of title in such circumstances as commonly to render him liable at the suit of the rightful owner to an action of replevin.

A person in the employ of the receiver embezzles some part of the trust fund.

One commits a trespass upon realty belonging to the trust.

Now, so far as the legislature has spoken on the subject of the administration of the property of an insolvent corporation for the benefit of its creditors, as we have heretofore seen, it has merely indicated by implication, though as plainly as if it were done expressly, that it shall be after the manner of suits in equity commenced by general creditors' bill. Such a bill is properly filed against every person as defendant, possessed of any part of the trust fund in the capacity of trustee for creditors, and also against any person who should be made a defendant for his due protection and to prevent multiplicity of suits. He is liable to the creditors as a class, but upon grounds rendering the liability not enforcible except so far as necessary. There is the test of the scope of the subject matter of the suit. That it does not include any such matters as those suggested in counsel's illustrations, or any claim involving merely the relation of debtor and creditor, or any liability of an officer of the corporation purely personal to a particular creditor, as explained in *Killen v.*

Barnes, 106 Wis. 546, 82 N. W. 536, seems plain. That it does include all claims, statutory or otherwise, against officers and stockholders of the corporation as such, whether considered as assets of the corporation and so a part of the trust fund proper, or liabilities to the creditors as a class to be enforced only so far as necessary to pay them, and forming a part of the trust to that extent, and all liabilities against persons occupying the position of constructive trustees for the creditors by reason of their having obtained the property of the corporation in fraud of creditors, has often, in terms or in effect, been heretofore declared, the most recent instance being *Williams v. Brewster,* 117 Wis. 370, 93 N. W. 479. The trust relation to creditors, within these rules, of all the defendants brought into this litigation by amendment, has heretofore, it seems, been clearly demonstrated. While it does not appear especially difficult to apply the proper test and determine what matters may be and what may not be brought into a winding-up suit without violating established practice, in view of the difficulties experienced in the administration of the remedy, as indicated by the recurrence of controversies in respect to the matter, since the court many years ago recorded its judgment in respect thereto in *Hurlbut v. Marshall,* 62 Wis. 590, 22 N. W. 852, where, after explaining in detail the scope of the remedy in harmony with the foregoing, the court said, "all of the principles involved are elementary and not at all abstruse,"—something further, it seems, should be said. The declaration that all of the principles involved are elementary and not at all abstruse does not necessarily mean that there may not be many situations where difficulties may legitimately exist after applying established principles, in determining whether a person is liable to account as trustee, within the broad meaning of that term, to the creditors, but only in case of clear error in that regard should the ruling in respect thereto, by the court charged with the duty of supervising the administration of a trust, be disturbed.

It has been common to point to the supposed complicated

character of these administration suits, as counsel have done in this case, as a reason for restricting their scope, or as a reason why some particular matter involved should not be deemed a legitimate part of the subject matter of the action. In many cases that has been done apparently without appreciating the dominating principle involved. A good instance of that is *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922, where, as in this case, the appellant's counsel mistook mere parts of one subject matter for distinct causes of action, and confused the relation between the trustee and the *cestui que trust* with that between debtor and creditor, and liabilities purely personal to one with liabilities to a class and only contingently enforcible; and so misconceiving the true boundaries of an administration suit referred to the practice in such cases, as this court has been constrained to outline it, as "confusing and complicated to a degree entirely inconsistent with a safe and reasonably convenient administration of justice."

Of course, nothing new was declared in *Hurlbut v. Marshall* as to the legitimate scope of a suit in equity to administer the trust fund. The whole subject involved was covered by the doctrine that the liabilities referred to were to be deemed a trust fund and treated as such. The case only went to the extent of holding, perhaps more plainly than before, that the legislature intended, by secs. 3216 to 3239, inclusive, Stats. 1898, that a creditors' action against an insolvent corporation should be commenced and prosecuted according to principles of equity for the judicial administration of a trust, all the beneficiaries thereof being proper plaintiffs and all holders of property in the capacity of trustees for them in any sense, or liable to them as a class, by virtue of the statute being considered as legitimate parts of the trust fund to be administered, being defendants. The principles of the judicial administration of a trust fund for creditors had long been theretofore established. There can be but one such administra-

tion. The court first acquiring jurisdiction by the filing of a proper bill and the commencement of a proper suit, whether all of the necessary parties are first brought in or not, retains it to the end. *Northwestern I. Co. v. Land & R. I. Co.* 92 Wis. 487, 66 N. W. 515. All actions theretofore commenced affecting the trust property are adjourned, so to speak, thereinto, and all subsequent actions interfering with the trust property are thereby barred. The whole subject matter is necessarily encompassed by the one suit, and nothing can be legitimately allowed to judicially occur that will impair its unity. One of the purposes of such unity is to avoid multiplicity of suits. The dominating idea is that equality is equity, that it should exist as to benefits and burdens, and that such end can only be accomplished by participation of all persons standing in the relation of *cestuis que trustent* and trustee, and all affected by extraordinary liabilities not to be enforced except upon equitable principles, so far as necessary to meet the demands of the creditors contingently and equally, should be brought into the litigation. The principles involved mark the boundaries of the subject matter to be administered. So far as the boundaries are thus set courts should not endeavor to restrict them because they include a great number of issues of different sorts between plaintiffs and defendants, and different equities as to one class of plaintiffs from those of others, all to be worked out in one omnibus proceeding. It is not infrequent that the profession and the bench feel like revolting at the magnitude of such an undertaking, and yet one of the most valuable features of equitable remedies is the opportunity they afford the court to lay hold of a subject matter, however large, made up of a single primary right and all rights germane thereto, however numerous, or several such subject matters under certain circumstances, bring all parties directly interested before the court, with all parties necessary to be there for their due protection, and settle the entire controversy by a single decree in a single administration proceed-

ing, giving to each party his just measure of relief or protection, and each his just measure of punishment, forever closing the primary dispute and all so connected therewith as to be legitimately considered a part thereof. It would be a backward step in the administration of justice to let the magnitude and complexities of a single subject matter lead to a sacrifice of one iota of such principle.

If the mere magnitude of the work, the number of parties and issues, and variety of relief demanded, legitimately included within a single subject matter, would furnish any justification for failing to vindicate the established practice to its full extent, this case—with its record of between 6,000 and 7,000 pages, and requiring, after all the industry of counsel had been exhausted in condensing such a vast amount of material into as small a compass as practicable, about 3,400 pages of printed matter to present it—would accomplish that result; but it does not. Principles do not change with the magnitude and difficulties of cases. Of course, there is no danger of such liabilities as the learned counsel suggests in his illustrations being included within the subject matter of an administration suit. They, like any other mere thing in action, pass to the receiver and become a part of the trust property in his possession, to be converted into money at his suit if necessary, while the liabilities of trustee defendants and of those whose responsibilities are only enforcible upon equitable principles, are to be marshaled into the trust fund in money by direct proceedings in the main suit. The dividing line, so far as the principles involved are concerned, is plain. Probably, except for the bar that established practice has set up in the matter, the liabilities enforcible for beneficiaries of the trust fund in a winding-up suit might be very much extended, as intimated in *Peck v. Elliott,* 79 Fed. 10, cited by respondents' counsel. There the federal court held that its authority extended to gathering mere dues from creditors of the corporation defendant into the trust fund in

money, by independent suits in the name of its receiver, or by making the debtors defendants in the winding-up suit. That is in harmony with what we have said to the effect that the power of the court in such matters is plenary except so far as it is limited by sound judicial discretion. It is so effectually limited here that the making of mere debtors parties defendant in the original suit would be deemed most serious error.

The final conclusions that must be drawn from the foregoing seem clear.

All of the alleged liabilities made a part of the subject matter of this suit by the supplemental bill, either were unknown to the creditors when the suit was commenced, or they thereafter accrued. They are all material to the original purpose of the action,—the one subject thereof. Had they existed at the origin of the litigation, they could have been made a part of the plaintiff's cause of action. Unless the receivership feature is a bar, it is within the discretionary authority of the court to permit them to be made a part thereof by the supplemental bill. While the general practice in settling a receiver's account, and the amount for which he is liable for breach of trust is by special proceedings in the action wherein he was appointed, issues being made up and tried before the court or referee or otherwise as to the court may seem best, the beneficiaries having full opportunity to be heard in the matter, and the general way of enforcing payment of whatever sum the receiver may in such proceedings be adjudged liable for is by way of contempt proceedings,—that method is not exclusive. The whole subject is under the control of the court within the boundaries of sound judicial discretion. It might in exceptional circumstances permit an independent action to be brought against its receiver by the beneficiaries of the trust; or, if the original suit were yet open, permit him to be made a defendant therein and the matter involved be closed by the general decree.

If it is alleged as to a receiver, that during the course of his administration he pursued a systematic course hostile to the primary beneficiaries, concealing his conduct from the knowledge of the court till the trust fund was, by him and those fraudulently colluding with him, wasted or put beyond the reach of such beneficiaries, except so far as the same could be recovered by judicial proceedings, and there is probable ground for believing that the charge is true, and the issues raised in the action in respect to the trust are still open, it is competent for the court, on such showing, to permit the claim on behalf of the creditors, against the receiver and his alleged guilty participants, to be treated as a part of the original subject of the action, and to be brought into it for trial by supplemental bill.

If an action is commenced ostensibly to administer the assets of an insolvent corporation, but really pursuant to a fraudulent agreement between its officers or its officers and others, to enable them to control the corporate assets for their own benefit, and in execution of such fraudulent scheme those controlling the suit induce the court, by false pretenses, to appoint as receiver one of their own number who will use his office to enable them to effect their wrongful purpose, and he does so use it, the court may, upon being satisfied of a probability that such fraud has been committed, for the purpose of having the truth of the matter judicially determined, permit the creditors to treat such receiver as having been the agent of the corporation and its officers, and the assets of the corporation to have been by his aid continued under their control, though being ostensibly under the control of the court. In such circumstances it is eminently proper for the court—the condition of the suit being such that under any circumstances a supplemental complaint might be made—to allow such officers and such agent to be made parties defendant and charged as trustees for creditors, as to the property of the corporation still in their hands, and the value of all wrongfully

appropriated by them or otherwise lost through their wrongful conduct, or that of either of them, in execution of the original fraudulent design. To bring such parties into the suit as defendants on either of the contingencies mentioned, it is believed, would not be a stretch of judicial discretion, and on the last one mentioned would be a very wise exercise of judicial power.

Upon a review of the whole situation, we can see no legitimate ground for appellants to complain. They had as full an opportunity to be heard in their defense as they would have had if any other method, adequate under the circumstances to meet the case, had been adopted. Certainly, no good ground exists for the court to hold that the practice adopted was such an abuse of judicial power as to constitute jurisdictional error. On the contrary, in view of the feature of the case as to Rust being really the arm of the corporation defendant and its officers, instead of that of the court, the practice adopted meets with our approval.

III.

Appeals.

We have now reached the merits of the appeals. There are many questions to be considered in respect thereto. If we were to discuss each appeal at length as regards matters of evidence, and the legal principles applicable thereto as well, this opinion would unavoidably be extended to such length that it seems best not to take such course, but to confine what we may say mainly to conclusions reached on minor and ultimate questions. The details involved have been studied with all the care that could reasonably be devoted thereto, having regard to the important interests involved. Notwithstanding the great length of the record, we trust nothing has been overlooked. The importance of fully understanding the evidence

in all its bearings, in view of the extraordinary character of the findings, could not well be overestimated. By such findings a score or more of men of the foremost in professional and business life in the community in which they resided, as appears, and whose integrity in their relations with their fellow-men we must assume was above reproach, are condemned as having been guilty of conceiving and executing one of the most far-reaching and dangerous frauds of which we have any history in the records of judicial investigations; a fraud that required in its consummation the services of the agents of one of the highest judicial tribunals known to our law, and which obtained that aid; a fraud, if we must take the findings as right, so manifest in the various steps in its consummation, as they were brought before the court, that it could not have escaped the notice of the judicial head having charge of the matter, without such inattention thereto as to make him, morally at least, a party to the wrong. Nothing equal to it has before come to our attention in experience or research. The characters of these prominent men, in business, professional, and official life, stand condemned before the bar of justice, and condemned so severely as to blacken their reputations beyond reasonable hope of the cloud being lifted, if the indictment be found to be justified by the law and the evidence. Four of the most prominent figures in this picture, and the three most prominent of them, have, as the record shows, since the action was commenced, entered upon that journey from which there is no return. If the conclusions reached by the trial judge are warranted by the evidence and the law, the judgment complained of comes far short of fully remedying the wrongs these men were guilty of, as regards the parties plaintiff directly interested; much less the administration of justice which they abused and in effect corrupted. If the conclusions of fact were reached by the trial court by overlooking material evidence or disregarding it, or drawing unwarranted inferences, and by misconceiving the rules of law

applicable to the case, a wrong has been done to these men, under the sanction of the law, and by distinguished and conscientious administration of it in the court whose judgment we are to review, of such a nature that, after the jurisdiction of this court shall have been exhausted to remedy it, the living parties now resting under the condemnation and those who stand for and feel the load of the absent participants will still be sufferers. These considerations are all entitled to, and will, receive attention in determining the scope of what should be said in order to vindicate the justice of the judgment complained of, if it is right; and vindicate the integrity of the condemned parties, so far as the evidence and the law will warrant, if the conclusions of the trial court and the judgment based thereon are found to be unjust.

A few questions are common to all the appeals. We will give attention to them at the outset.

A demurrer *ore tenus* was interposed as to each defendant. This seems to have been done upon the theory that it was not permissible to bring the matter litigated before the court by a supplemental bill or by proceedings in the way attempted, as to the receiver and his alleged co-wrongdoers; or upon the ground that a creditors' action against an insolvent corporation is wholly statutory and that no warrant is found in secs. 3216 to 3239, inclusive, Stats. 1898, covering the subject, for including the matters charged against the appellants; or because the supplemental complaint did not show that the condition precedent to the right to commence a creditors' action—the issuance of an execution to enforce a money judgment against the corporation and return thereof unsatisfied—had been fulfilled; or because the facts pleaded show inexcusable laches; or because damages caused by an actionable fraud cannot be recovered in an equitable action, and particularly not as part of a trust fund in a winding-up proceeding of this sort. We are left somewhat in the dark as to just what counsel did rely upon. Errors are assigned as to each appeal,

because the demurrer was overruled, but very little is said by counsel in respect thereto. Most of the reasons we have mentioned as likely to have been in the mind of counsel as a basis for their position have been treated in discussing the jurisdictional question. There, incidentally, it seems, enough was said to indicate that none of the suggested reasons can be successfully urged in support of the alleged insufficiency. The pleader stated in the complaint but one cause of action, and in that charged each defendant with a degree of responsibility fatally involving him in the wrong complained of. In other words, if there is a cause of action against one, it is against all.

True, as counsel suggest, it is essential to a cause of action in equity by creditors, to administer the property of an insolvent corporation for their benefit, by statutory regulation and otherwise, that it be alleged that all legal remedies for the collection of the moving creditor's claim have been exhausted by the establishment thereof at law, the issuance of an execution thereon in a good-faith attempt to collect the same, and a return of such execution unsatisfied. *Hinckley v. Pfister,* 83 Wis. 64, 82, 53 N. W. 21; *State ex rel. Fowler v. Circuit Court,* 98 Wis. 143, 151, 73 N. W. 788; *Davelaar v. Blue Mound I. Co.* 110 Wis. 470, 474, 86 N. W. 185; sec. 3216, Stats. 1898. Respondents' counsel, answering that proposition, suggest, in effect, that the rule laid down in *Hinckley v. Pfister,* that a defect in the complaint in regard to such essential cannot be raised by demurrer *ore tenus,* has been overruled, citing *Hoff v. Olson,* 101 Wis. 118, 76 N. W. 1121, and *Johnson v. Huber,* 106 Wis. 282, 284, 82 N. W. 137. *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *Bigelow v. Washburn,* 98 Wis. 553, 74 N. W. 362; *Post v. Campbell,* 110 Wis. 378, 384, 85 N. W. 1032, and many other such cases, might have been added. They are only to the point that an objection to the sufficiency of a complaint in equity, that it shows the plaintiff has an adequate remedy at law, is

waived unless raised by demurrer on that ground. That does not reach the question of whether the essential to a cause of action in a creditors' suit, where sequestration is sought, that all legal remedies shall have been exhausted in the manner before indicated, not being stated in the complaint, the defect can be raised by demurrer *ore tenus*. A defect of that character does not involve a mere matter of practice, such as whether the proper forum for the plaintiff to invoke is that of law or that of equity, as in the cases cited by counsel for respondents (*Martin v. Martin,* 112 Wis. 314, 317, 87 N. W. 232, 88 N. W. 215), but whether there is any cause of action at all. However, we are unable to discover that there is any such defect in the complaint in this case. It shows by appropriate allegations that a judgment was duly rendered at law in favor of H. H. Hayden against the insolvent corporation; that execution was duly issued on such judgment, and was duly returned unsatisfied; that thereafter the judgment creditors commenced an action which by due proceedings assumed the form of, and is in fact, the action in which the judgment complained of was rendered. Because, in the supplemental complaint, Mr. Hayden was made a defendant, so that it did not appear that any plaintiff, as the parties appeared upon the record at the trial, was so circumstanced as to be competent to commence such an action, is not material. The court having legitimately become possessed of the subject matter involved, the place thereafter occupied on the record by the person invoking the jurisdiction of the court at the start, whether plaintiff or defendant, or whether he dropped out of the litigation altogether, the fact still appearing by the complaint that the jurisdiction of the court was properly invoked, could make no difference. The mere arrangement of parties on the record in an equity case, in order that those united in interest may appear as plaintiffs and those adverse thereto may appear as defendants, the former standing for the subject matter of the action upon sufficient facts alleged, pertains to mere

judicial administration and is under the supreme control of the court within the boundaries of sound judicial discretion.

The point that the complaint shows the conduct of plaintiffs respecting the matters of controversy presented by the supplemental complaint was fatally tainted with laches, does not appear to have support. The complaint contains specific allegations to the effect that none of the facts alleged, upon which the liability of appellants is predicated, came to the knowledge of the respondents till shortly before the application was made for a reopening of the litigation and leave to bring in the new matter and new parties. No situation is disclosed indicating that respondents were guilty of negligence in not earlier discovering the facts so that, by the rules on that subject, they should be denied judicial aid. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 421, 89 N. W. 538, 92 N. W. 246. It is fairly inferable from the complaint as a whole that the circumstances which moved respondents to action, resulting in their appeal to the court to reopen the case, occurred at the time of and within a short period before the final closing-up of the receivership matter, and that nothing occurred prior to such period, known to plaintiffs or which they could reasonably be charged with knowledge of, so tending to suggest unfaithfulness on the part of the receiver that the respondents should have discovered, earlier than they did, the evidence of wrongdoing if it existed. In any event, there being no element of estoppel to be dealt with, and no fatal negligence on the part of the respondents, and no difficulty as regards the subject matter of the supplemental complaint, except as regards the time of bringing such matter to the attention of the court, whether the facts justified the court in permitting such complaint or not, does not go to the cause of action. It was a mere practice matter, addressed to the sound discretion of the court.

A point is made that the consolidation of the action commenced by *James T. Barber* and another, and the one com-

menced by H. H. Hayden, into one, and the allowance of a supplemental complaint as if only a single action remained, was an unwarranted proceeding. Counsel suggest, seemingly with confidence, that consolidation of actions means only consolidation of trials; that is, a trial of several actions together, not the trial of one action instead of several actions. Counsel cite authorities supposed to support that view. We do not feel justified in taking time to discuss them. In our judgment their import has been overlooked by counsel, and they have further overlooked the statute, sec. 2792, Stats. 1898, which expressly indicates, as of course the fact is, that consolidation of actions means the creation of one out of two or more that might reasonably have been brought as one. That power, as to actions formerly cognizable only in equity, exists independently of the statute. *Biron v. Edwards,* 77 Wis. 477, 46 N. W. 813. This was eminently a proper case for the exercise of such power. There could not be, without violating established practice, more than one action allowed to administer the property of the corporation and, incidently, other liabilities for the benefit of its creditors. Necessarily, the first one properly commenced superseded the other. Such other, since both were commenced in the same court, and judicial consent was given, became adjourned, so to speak, into the properly commenced action, as a matter of course, and the entry of the formal order in that regard only recorded the fact. From the time of the commencement of the Hayden action and the proceedings thereafter recognizing the status of the first action and affirming what had been done therein, there was really but one action to proceed.

The complaint charged that, as early as January 1, 1893, appellants *Thompson, Gilbert, Owen,* and *Barber,* and the deceased persons, Rust, Hayden, and Moon, all of whom were officers and stockholders of the corporation, knew that it was hopelessly insolvent, and then entered into a conspiracy to appropriate to their own use its assets in fraud of general

creditors, and that in pursuance thereof, prior to May 18, 1893, they caused to be hypothecated to themselves and to corporations in which they were interested, for the purpose of securing previously contracted debts of the insolvent to themselves and such corporations, a large amount of the insolvent's assets. Acts, in great detail, were alleged to have occurred pursuant to such conspiracy, all of which were covered, favorably to the respondents, with like detail in the findings, followed by a conclusion to the effect that all of such hypothecations were legitimately made, and that no such conspiracy as that alleged, or any other, prejudicial to the creditors of the insolvent, was formed by the alleged guilty parties prior to May 15, 1893. None of the acts on the part of such persons, alleged to have occurred to the wrongful prejudice of creditors prior to that time, were so found, and none before the commencement of the first receivership, May 23, 1893, except one, viz., the giving of the Brookville mortgage May 18, 1893, which will be considered in appeal No. 5; but it was found that some time after May 15, 1893, and before the commencement of the *Barber* action, the alleged guilty persons formed a conspiracy to place the property of the corporation with a court receiver, and to cause it to be administered by him, acting ostensibly as agent of the court but really as their agent, so as, in the end, under the forms of law, to appropriate such property to their own use. That finding, as indicated, was not based upon any direct or circumstantial evidence showing wrongdoing as to any occurrence before the date of the supposed conspiracy. Up to that time, which, as has been seen, was on the eve of the commencement of the receivership action, all of the alleged guilty parties stand forth wholly innocent of the indictment against them contained in the complaint. The hypothecations alleged to have been made were in fact made, but all but one of them, as found by the court, and that in legal effect, as we shall see hereafter, were made for a sufficient consideration while the

corporation was a going concern and its assets were free from any impress of a trust for the benefit of creditors. *Slack v. N. W. Nat. Bank,* 103 Wis. 57, 79 N. W. 51. The law in that regard in this state, when the supplemental complaint was made, was not so well settled as it was later when the cause was tried.

It seems quite evident from the complaint that it was framed upon the theory that the mere fact that the corporation was insolvent, if such were the fact, at the time the hypothecations were made, notwithstanding it was a going concern and might, so far as then known, continue in business indefinitely, impressed its assets with a trust for creditors, disabling its officers from dealing therewith, as to creditors, by taking security for debts due from it to them or those due to others secured by their responsibilities. Facts were alleged in great array, as regards occurrences long prior to the commencement of the action, which at the outset, it seems, were supposed to point conclusively to a precedent agreement and to its consummation, the legal effect of which, whether the occurrence took place by concert of action or not, would be a fraud upon creditors. However, in harmony with the settled principles as understood at the time of the trial, the court held, in the end, that no fraud was inferable therefrom as a fact, nor resulted therefrom as a matter of law. Up to this point the learned court, in reaching minor conclusions, followed the order adopted in the complaint. The evidentiary facts were first found, upon which the ultimate facts and conclusion of law claimed depended. When that was reached the alleged guilty parties were exonerated, not condemned. The findings were framed in an orderly and logical way, since the truth of the matter which the court was in quest of was to be disclosed if at all by circumstances. From that point on, the order seems to have been reversed. Instead of finding the existence of facts from which fraud might reasonably be inferred, if inferable at all, followed by the ultimate con-

clusion in respect thereto which the circumstances seemed to call for, the conclusion was reached at the outset and from that standpoint the actions of the parties thereafter—which in the main at least, if found wrongful at all, would under ordinary circumstances have been attributable and attributed to error of judgment from a business standpoint, or mistake of law, in the absence of some very clear indication to the contrary—were found to be successive steps in consummating the original design. The structural features of the findings, which the learned court which tried the case doubtless adopted at the suggestion of the learned counsel for the prevailing parties, are not entirely without significance in determining whether the evidentiary circumstances were found from the proper standpoint, and in determining whether fraud should or should not be inferred therefrom, which is in the main the basis for the judgment complained of.

The question of whether the findings of fact are supported by the evidence in the light of correct principles of law, is common to all the appeals. We are constrained in our considerations not to review at the outset the finding as to the alleged guilty parties having entered into the fraudulent combination held to have been made, but to consider the evidentiary circumstances as found, and after passing upon the exceptions to the findings in that regard, to then consider whether what remains of such findings supports the conclusion of fact as to the fraudulent conspiracy or not.

In considering the exceptions to the findings, these familiar principles will be recognized and applied. They are mentioned here to avoid referring to them in detail as the review of the case proceeds:

1. 'Since the circuit judge who tried this issue had the benefit and advantage of a personal examination of the witnesses, and was better qualified to judge of the weight to be given to their testimony by the usual tests of credibility, than this court can be, his finding of the main facts ought not to be dis-

turbed without such a clear and palpable preponderance of the evidence against it as will create a positive conviction in our minds that he erred in his conclusion.' *Rice v. Jerenson,* 54 Wis. 248, 251, 11 N. W. 549; *Zoesch v. Thielman,* 105 Wis. 117, 80 N. W. 1107; *Vilas v. Bundy,* 106 Wis. 168, 81 N. W. 812; *Johnson v. Goult,* 106 Wis. 247, 82 N. W. 139; *Wyss v. Grunert,* 108 Wis. 38, 83 N. W. 1095; *Wussow v. Hase,* 108 Wis. 382, 84 N. W. 433; *Remington v. Eastern R. Co.* 109 Wis. 154, 190, 84 N. W. 898, 85 N. W. 321; *Endress v. Shove,* 110 Wis. 141, 85 N. W. 651; *Hill v. Am. Surety Co.* 112 Wis. 627, 88 N. W. 642.

2. The foregoing rule requires, in order to warrant the disturbance of a trial court's findings of fact upon appeal, that such findings shall appear so plainly against the preponderance of the evidence as to be explainable only by want of proper consideration of the evidence, mistake in overlooking material portions thereof, or prejudice, or some other improper cause. *Wyss v. Grunert,* 108 Wis. 44, 83 N. W. 1095.

3. The burden of proof is on him who alleges fraud to establish the same by clear and satisfactory evidence,—not to that degree of certainty which is said to be beyond a reasonable doubt, but by a preponderance of the evidence so clear and satisfactory as to establish the fact found with reasonable certainty, giving due weight to the presumption that human actions in business relations are characterized by good faith, at least as regards responsibilities of which the law takes notice. *"Odiosa et inhonesta non sunt in lege præsumenda; et in facto quod se habet ad bonum et malum, magis de bono quam de malo præsumenda est."* (Odious and dishonest things are not to be presumed in law; and in an act which partakes both of good and bad, the presumption should be more in favor of what is good than what is bad.) Co. Litt. 78; *Rice v. Jerenson, supra; F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 52, 71 N. W. 69; Jones, Ev. § 190; 14 Am. & Eng. Ency. of Law (2d ed.) 190.

4. The first rule mentioned does not apply where it is manifest that the findings were based upon a mistaken view of the law. *Milwaukee Co. v. Pabst,* 70 Wis. 352, 35 N. W. 337.

5. The first and second rules mentioned apply with more or less force according as the record discloses the existence or nonexistence of those elements upon which it is based. So far as the ultimate facts are dependent upon inferences from undisputed evidentiary matters fully appearing upon the record, the supposed better opportunity for the trial court to discover the proper inference is not to be overcome upon appeal by greater clearness in the evidentiary effect of such circumstances than would be required in viewing the same from an original standpoint.

6. The admission and consideration of improper evidence is deemed immaterial upon appeal in considering the question of whether findings made by the court are supported by the evidence, unless it clearly appears that otherwise the findings would have been different. *Hill v. Am. Surety Co. supra; Duncan v. Duncan,* 111 Wis. 75, 86 N. W. 562. The rejection of proper evidence is deemed immaterial in the circumstances mentioned in the foregoing rule, unless it appears that had it not been for such rejection the findings might probably have been materially different.

7. It is presumed in viewing a trial court's finding that improper evidence taken under objection was given no weight in reaching the final conclusion, unless the contrary appears. *Rozek v. Redzinski,* 87 Wis. 525, 58 N. W. 262; *Farr v. Semple,* 81 Wis. 230, 51 N. W. 319.

While from the wording of the notices of appeal as regards sec. 3052, Stats. 1898, we were compelled to hold that nineteen distinct appeals were taken, appellants are united in interest according as their names appear in the several instruments by which the appeals were taken, except in one case, where there are two appellants, but two distinct interests as regards costs. That is to say, testing the appeals by the in-

terests to be dealt with, we have but eight parties appellant. We will treat them that way.

All questions that will now be treated should be understood to have been raised by proper exceptions. Except where necessary we shall not undertake to mention exceptions or assignments of error.

Appeal No. 1.

Appeal by W. A. and *A. J. Rust,* as personal representatives of R. E. Rust, deceased.

The facts found by the trial court in respect to this matter appear in detail in the statement preceding the opinion in findings 175 to 181 inclusive. The following history of the matter appears wholly or substantially undisputed in the evidence as we view it. Many of the features are embodied in the findings, though those omitted have a material and perhaps controlling bearing.

The National Electric Manufacturing Company, some three years before the commencement of the first receivership action, which for convenience we will hereafter call the *Barber* action, installed an electric lighting plant at Asheville, North Carolina, on lands owned by J. A. Lyman, it being understood then or some time thereafter, and prior to May 5, 1891, that he would take $1,000 in bonds secured upon the property, for such land. The local company which owned the plant, and the debtor of the electric company, was the People's Light, Heat & Power Company, which we will hereafter call the proprietor company. Prior to May 5, 1891, such company placed a trust deed on the electric plant and the land upon which it was situated, to secure thirty-four $500 bonds, which were to be used, in the main at least, to pay the electric company on construction account. On the day named the latter company opened an account with this bond matter by a debit item of $17,000, and a memorandum that the bonds were received and delivered to George B. Shaw. On

the same date the account was credited with numbers 1 and 2 of the bonds, $1,000, with a memorandum explaining that *they were left with Cobb & Merriman,* attorneys at Asheville, to pay Mr. Lyman for the land upon which the electric plant was situated; and was also credited with numbers 10 to 14 inclusive of the bonds, $2,500, with a memorandum indicating that the same had been delivered to J. A. Lyman. For what purpose the latter delivery was made does not appear, but it does appear that the electric company did not at any time own the bonds so delivered, after May 5, 1891. The $1,000 in bonds "were left with Cobb & Merriman" pursuant to some arrangement to which the proprietor company was a party. Whether the electric company at any time was the owner of such bonds, or controlled them for any purpose, except to deposit the same with Cobb & Merriman for the use of Mr. Lyman, does not appear. The indications are that it did not, and that they were never taken from Asheville by the electric company or its receiver, or any one acting for either to the knowledge of the latter. It never had possession of the bonds, if at all, subsequent to May 5, 1891, the day, so far as indicated, when it first had dealings with the bond matter. In addition we find in the record, in the form of an agreement on the trial: "It is conceded that the amount owned by the receiver was $2,500." That must have been overlooked in drawing the findings. The deposit with Cobb & Merriman was made by the electric company and the proprietor company for the special purpose of paying Mr. Lyman.

Default was early made in the payment of interest upon the bonds, only the first six months' interest being paid. Prior to January 1, 1893, and while it was competent to do so, twelve of the bonds were turned out by the electric company to the *Chippewa Valley Bank* of Eau Claire, Wisconsin, as collateral security, and ten of the bonds were likewise turned out to M. G. Shaw of Eau Claire, five bonds, of $2,500 only, remaining under the control of the electric company. The

facts in that regard were duly entered on the company's books. Thereafter, and before January 1, 1893, the *Chippewa Valley Bank* took charge of the matter of protecting the interests of the Eau Claire bondholders, itself, M. G. Shaw, and the electric company, employing H. B. Walmsley and H. H. Hayden, attorneys of Eau Claire, Wisconsin, in respect thereto. Such attorneys, from first to last, the period reaching down to the trial of this action, looked to the bank as their employer and were paid by it. In all of the transactions by such attorneys as to the matter Mr. Walmsley was the active man, spending considerable time in respect thereto in Asheville.

About January, 1893, Mr. Walmsley discovered that Cobb & Merriman had possession of $1,000 of the bonds for the purpose before indicated, and that Mr. Lyman would not accept the same for the real estate upon which the electric plant was located. Some time thereafter, and long prior to the commencement of the receivership, he obtained possession of such bonds, acting in the interests of all the bondholders he represented. At this time, and at all times thereafter, the $2,500 of bonds sent to Lyman as aforesaid were owned, $1,500 by him, and $1,000 by William M. Barnard, both of Asheville.

Mr. Walmsley took such measures to enforce payment of the bonds, by authority of all the Eau Claire bondholders, but looking to the bank as his employer, that some time prior to the commencement of the *Barber* action he caused the trust deed securing them to be foreclosed and the property to be sold, being himself compelled to bid in the same for the protection of his clients, which he did for $5,001. Lyman and Barnard would not participate as purchasers, and demanded their pro rata share of the $5,001. To settle with them, and with Mr. Lyman for the realty, and pay the trustee's fees upon the foreclosure sale, $1,835 was required. Mr. Walmsley arranged all the matters in that regard at Asheville, mak-

ing a draft upon the *Chippewa Valley Bank* for the amount required less the trustee's fees.

About the time the draft arrived at Eau Claire the *Barber* action was commenced, the property of the electric company being placed in the hands of R. E. Rust as receiver. The books of the insolvent then showed but $2,500 of Asheville bonds controlled by it. The receiver thereafter dealt with the matter in all transactions in regard thereto upon the basis of his holding, in some capacity, five twenty-sevenths, or $2,500 only, of the bonds represented by Walmsley, the others so represented being those held by the *Chippewa Valley Bank* and M. G. Shaw.

Aside from some doubtful liabilities of stockholders and officers of the proprietor company, the bonds were valueless except so far as money could be realized out of the property acquired at the foreclosure sale. Five twenty-sevenths of the money necessary to protect the title to such property in Walmsley and make the same available for the Eau Claire bondholders was a valid charge thereon. No one could have acquired any interest therein under the circumstances, on account of the receivership bonds, except by paying five twenty-sevenths of such money. In that situation Mr. Rust was applied to by Mr. Walmsley, or some other agent of the *Chippewa Valley Bank,* for his share of the $1,835. He complied, using his private funds. He did not deem it proper, without permission of the court, to risk receivership money in the matter, but was willing to take the risk personally rather than to forego all opportunity to realize on the bonds.

Before doing as above indicated, Rust caused the whole situation to be presented to the circuit judge by his attorney, for the purpose of obtaining judicial authority to participate in the proceedings to acquire the Asheville plant and enforce collection of the bonds at the expense of the trust fund, with the result that such authority was refused. The evidence is so undisputed and conclusive on this point that it must be

taken as true unless all rules for weighing evidence are to be set aside. There is much evidence on the subject, and many circumstances, all in harmony. Counsel for respondents, on cross-examination, asked Mr. Frawley: "Why did the court decline to authorize the expenditure, while he authorized the expenditure in the Bucyrus and other matters?" to which the answer was given, "The matter was presented to the court,—" to which counsel said: "I know that," when the witness continued: "I will simply tell you what he said: He said he did not think anything would ever be realized out of it, and did not think it would be good business judgment to put in any money down there,—did not think anything would be realized."

Thereafter, during the whole time of the receivership, except as to $524.26 which will be hereafter referred to, when money was required to be advanced on account of the Asheville matter as to the receivership bonds, Mr. Rust paid the same out of his private funds, or assumed liability to do so, as between himself, the *Chippewa Valley Bank,* or *George T. Thompson* as its representative, and M. G. Shaw.

Rust had no knowledge of the $1,000 of bonds before mentioned other than what appeared upon the books as they came into his possession as receiver. He made no account thereof, and though he made some effort to discover their location and ownership, it does not appear that he succeeded. He made inquiry of Mr. Walmsley while the latter was at Asheville about one year after the receivership commenced, but it does not appear to have been made from any supposed value in the bonds, or ownership in himself as receiver, but in order that he might have a complete record of the entire issue of $17,000. Mr. Walmsley, upon the trial, explained his silence as to the $1,000 of bonds by saying that he understood they were deposited by the proprietor company and the electric company to pay Lyman for the realty, and that upon his being compelled, representing the Eau Claire bondholders,

to pay money in lieu of the bonds, he regarded the same as belonging to those who advanced such money. In all the transactions by Rust as receiver, whether with his associates *Thompson* and Shaw, or otherwise, no account was taken of bonds owned by the electric company at the time of the commencement of the *Barber* action, except the $2,500.

After the title to the Asheville plant was perfected in Mr. Walmsley for the Eau Claire bondholders, they believing—and with good reasons therefor—that the best way to realize thereon in money was to disorganize the plant and sell the wreckage, shipping the major part thereof to Eau Claire for that purpose, that course was taken. There is nothing in the record to impeach the good faith of this proceeding, or the judgment which dictated it. The amount thus realized was $4,482.30, out of which Mr. Rust handled $1,452.02, which was accounted for between him, the *Chippewa Valley Bank,* and M. G. Shaw. The amount paid out in respect to the matter, including the first payment of $1,835, and exclusive of attorney's fees, was not less than $2,934.45. We make it from the evidence somewhat more, but as that is all counsel claim we will adopt their figures. Mr. Rust personally, directly or indirectly, paid five twenty-sevenths of the $2,934.45, or became liable therefor. There was left, out of the sum realized from the property acquired at the foreclosure sale, not more than $1,548.45—somewhat less, it seems—to pay the expenses of the attorneys and to apply upon the bonds. Expenses were incurred in connection with disorganizing the Asheville plant and turning the same into money, in addition to the above, to the amount of $524.26. These expenses were incurred largely by the regular agent of the receiver, and were paid by the latter out of receivership moneys, he charging the same to himself, *Thompson,* and Shaw.

After the foreclosure of the trust deed Walmsley and Hayden continued in the employ of the *Chippewa Valley Bank*

in respect to the collection of the Asheville bonds, Mr. Walmsley spending much time at Asheville for that purpose. In his judgment there were certain liabilities of stockholders and officers of the proprietor company enforcible for the payment of the bonds. Upon his advice several suits were commenced, some in the state court and some in the federal court, in North Carolina, to enforce such liabilities. The litigation in that regard was commenced in 1894 and was still pending at the time of the trial of this action, there then being no reasonable hope of recovering anything for bondholders, and nothing having been theretofore recovered. At first Mr. Rust's name as receiver was used with those of other Eau Claire bondholders, in the prosecution of the suits referred to, but upon that fact being brought to his attention he promptly demanded that his name should not appear in that way, as he claimed the $2,500 of bonds personally. The demand was made and reason given therefor by letter. A few days subsequent thereto he again wrote Mr. Walmsley on the subject, explaining that he claimed ownership of the bonds personally because the court would not permit him to represent them in the litigation as receiver,—would not allow any receivership money to be risked in the matter, and that he had to treat the bonds as his own. He directed reports to be made to him as receiver, as the bonds, or the proceeds, might ultimately revert to the trust fund. Seasonably after receiving such letters Mr. Walmsley caused Mr. Rust to appear in the litigation in his personal capacity instead of as receiver. He did not thereafter, as receiver, in any way participate in the litigation.

The entire expenses of the litigation, including those of local attorneys and the amounts paid Hayden and Walmsley for services and expenses, were about $4,000, about $3,000 of which was paid to Hayden and Walmsley, the greater part being paid prior to July 20, 1894. The entire expenditures made in the enforcement of the Asheville bonds, including

the $2,934.45 aforesaid, were $6,970.33, not counting the $524.26 paid by Rust, receiver. The net result of the matter, leaving out the $524.26, was a loss of $2,488.03, five twenty-sevenths of which Mr. Rust paid or became liable for personally. The account with the matter, as to him, should be stated thus:

To five twenty-sevenths of $6,970.33	$1,251 87
To receivership moneys chargeable to Rust	524 26
Total	$1,776 13
By amount received from property	830 06
Balance, loss	$946 07

Thus, if the liabilities adjudged as to Rust for the $524.26 and the bonds stand, the trust fund will be relieved from all the burdens of his participating in the Asheville matter, and will be enriched by $1,000 and interest, while a loss of $945.07 and interest will fall on his personal representatives.

In May, 1897, nothing was left to be done to close up the receivership matter, except to close out a large amount of book accounts supposed to be of little or no value, and other accounts where moneys were paid out by the receiver in enforcing hypothecated matters and charged to the holders of the security, to sell some few articles of tangible property, to pass upon the receiver's account, and to distribute the remaining funds in his hands according as the court might order. About this time Mr. Rust's relation to the $2,500 of bonds as stated, and to the suits pending at Asheville, was such that he desired to acquire title to such bonds, and he so informed his attorney, Mr. Frawley, asking him to bring that about. The absolute passing of the title to the bonds to any one without recognizing the equitable claim for the outlay made by him in efforts to collect the same, would have left him without any opportunity whatever to retrieve his loss, and at the same time introduce a person into the pending litigation that might not act in harmony with those who had risked much in pursuing the same. Rust verified his final account

May 28, 1897, and thereafter filed the same in the office of the clerk of the circuit court for Eau Claire county. The aforesaid worthless book accounts were therein plainly scheduled, and also the other accounts of the moneys paid out of the trust fund and charged to holders of the collateral. The so-called worthless accounts included the bond account of $2,500. In respect thereto a memorandum was made to the effect that a suit was pending at Asheville, the outcome of which was doubtful. On the day the account was verified, a petition was also prepared and verified for presentation to the court, to obtain authority to dispose of the so-called worthless accounts in the discretion of the receiver. An order was entered accordingly. Later a second order was entered in respect to the same matter, particularly directing the time and manner of disposing of the accounts and authorizing, also, the sale of all personal property still on hand. The order was duly executed, the sale being made at public auction. De Alton S. Thomas purchased the accounts for $53, the face of the same being upwards of $22,000.

Before the sale took place notice was publicly given that certain of the accounts had been adjusted by order of the court, including the account of $524.26 against *Thompson,* Shaw, and Rust, and that such accounts would be withdrawn from the sale; that an account against *John S. Owen* had been paid and would be withdrawn; that a claim against the Bucyrus Steam Shovel & Dredge Company was involved in a suit pending in the circuit court for Milwaukee county, *John S. Owen,* D. R. Moon, *J. T. Barber, Fitch Gilbert,* and *George T. Thompson* having advanced upwards of $5,000 in respect thereto; that "Asheville bond account, face value $2,500," with like bonds owned by the *Chippewa Valley Bank,* were in suit in North Carolina; that the court, upon application for directions as to the course the receiver should pursue in reference thereto, had declined to permit him to expend trust funds in the matter; that substantially $1,000

had been advanced in the litigation by the bondholders interested, and that such amount would have to be paid before any sum realized out of the litigation or upon the bonds could be made available for the purchaser at the sale. Further notice was given that all accounts noted in the schedule as assigned or hypothecated would be sold subject to the rights of the assignees or those to whom the hypothecations had been made. Mr. Thomas bid off the accounts for $53, subject to the conditions indicated. After the sale a report of the same was made to the court, stating particularly the circumstances thereof, including the notice given as regards the Asheville bond account. Report was further made that the purchaser desired not to take the incumbered accounts, but to have them transferred directly to the parties holding the incumbrances. An order was prayed for confirming the sale, and for authority to transfer the accounts in the manner indicated. An order to that effect was thereupon entered.

The disposition of the account against Rust, *Thompson,* and Shaw, of $524.26, will be considered in the next appeal. Suffice it to say here that there is nothing in respect thereto which materially affects the merits of this appeal.

We have studied the foregoing history in vain for a well-grounded suspicion that Rust converted $3,500, or any other amount of receivership bonds to his own use, fraudulently or otherwise, or that the bonds that came to his hands could have been of any value to the trust fund, or for any definite indication that more than $2,500 of the bonds ever belonged to such fund. We cannot set aside the positive testimony of unimpeached witnesses, and find contrary thereto upon conjecture. The material parts of the findings, 175 to 181 inclusive, upon which the judgment is based, as regards the Asheville bonds, cannot be sustained.

Finding 175, to the effect that the insolvent held $3,500 of bonds at the time of Rust's appointment as receiver, is contrary to the plain evidence that $1,000 thereof were set aside

by the proprietor company in connection with the electric company, representing all parties interested in the bonds, for a particular purpose, and that such $1,000 did not thereafter come to the possession of the insolvent or its receiver. It seems that the position taken by Mr. Walmsley,—that the Eau Claire bondholders having contributed the money necessary to take the place of the bonds, they thereby became the owners thereof, inasmuch as the bondholders in the whole, subject to the rights of the proprietor company, owned the escrow,—is not without force. How the conclusion was reached, recorded in the 175th finding, that the electric company received $14,500 of the bonds on construction account, instead of $13,500, we cannot discover, since the evidence shows, as before indicated, that it received for some purpose the entire $17,000 of bonds. That it was a mere conduit, however, for the transmission of $1,000 of the bonds to Cobb & Merriman, all the remaining bonds to be in effect a lien thereon, the same as it was a conduit for the transmission of $2,500 of bonds to Mr. Lyman, which the court found, ultimately, belonged $1,500 to him and $1,000 to Barnard, seems plain. The proof is just as clear that it was the owner of the $2,500 in bonds as that it was the owner of the $1,000. We venture to say that there can be no reasonable doubt on that question.

Finding 176, to the effect that $1,000 of the bonds were sent to Asheville for use in purchasing the real estate of Lyman shortly before the receivership commenced, must be seen from what has been said, to be clearly unsupported. Those bonds were never out of Asheville till long after the receiver was appointed, if at all.

Finding 178, to the effect that the receiver never had nor asked for judicial direction as to the Asheville matter, must be wrong, because the direct evidence, and substantially all evidentiary circumstances as well, are to the contrary. Mr. Frawley, with all the directness, clearness, and fairness, so

far as appears from the record, that could be expected of one called upon to give in detail the history of a transaction many years after its occurrence, testified, in effect, that shortly after Rust was appointed receiver he, Frawley, prepared a petition for such receiver to present to the court for the purpose of obtaining judicial advice in such matter, setting forth therein the whole situation, that such petition was presented to the court, permission being asked therein for the receiver to participate in such matter at the expense of the trust fund, and that such permission was refused. No one testified to the contrary. Mr. Walmsley testified that Mr. Rust informed him that such was the attitude of the court. Mr. Rust's letters to Walmsley, while the latter was at Asheville, written in 1894, indicate the same, and further that the receiver expected, if he realized anything net out of the Asheville matter, to account therefor. *Mr. Thompson,* who, as agent for the *Chippewa Valley Bank,* disbursed most of the money used in the endeavors to realize upon the Asheville property, testified that he dealt with Mr. Rust, personally, from first to last, understanding that the court would not permit the trust funds to be used. None were used at any time, except the $524.26. Rust's personal participation in the matter was brought particularly to the attention of the court, with the reasons therefor, in the petition presented for confirmation of the sale of the bond and other accounts to Thomas, and then received judicial sanction. The testimony is undisputed that the circuit judge was fully conversant with Rust's conduct in respect to the bonds when that order was entered. Other circumstances of a significant character might be mentioned, in harmony with those stated. The only one on the other side is the feature that the written petition which Mr. Frawley testified was presented to the court in May, 1893, asking for permission for the receiver to participate as such in the Asheville matters, was not on file or produced. Give it all the significance it will reasonably bear, and it comes far short, under

the rules governing the subject, of being sufficient to warrant this court in finding that Mr. Frawley, and the other witnesses as well, all testified falsely, and that the circuit judge gave his judicial sanction to a statement of facts that was untrue.

Finding 179, as to Rust's dealing with the Asheville bonds in a capacity adverse to the trust, cannot be sustained for the reasons before indicated. It is wrong as to his having failed to disclose the ownership of the $1,000 of bonds designed to be used in paying Mr. Lyman for the land upon which the electric plant at Asheville was situated, and representing to the court that there were but $2,500 in receivership bonds, well knowing that the amount was $3,500. That is sufficiently indicated by what has been said. It is wrong as to his having wrongfully failed to disclose to the court receipt by him of $1,400 from sales of machinery taken from the Asheville plant. The finding is framed so as to indicate that Mr. Rust made a profit of $1,400 out of the Asheville matter and concealed the same from the court, when the facts in respect thereto, as we have stated, were these: Mr. Rust went into the matter in good faith after informing the court of the situation. He came out with a serious loss, even if matters were left where the circuit judge who passed his account left them. The other parts of finding 179, as to fraudulent or any conduct on the part of the receiver to the prejudice of his trust, we find not to be supported by the evidence.

The final conclusion of fact, No. 181, that the receiver fraudulently converted to his own use $3,500 of Asheville bonds of the value of $1,000, and the conclusion of law that his personal representatives, W. A. and *A. J. Rust* as executors of his last will and testament, are liable for the $1,000 and interest, is clearly wrong, as we have seen. In the circumstances the bonds were in at the time he was appointed receiver, they were of no value. The court displayed good

judgment in not allowing receivership money to be jeopardized by investing the same in the Asheville matter. If it had taken a different course and allowed Rust to burden the trust fund with a proportionate share of the expenses of trying to realize on the bonds, such fund would have been depleted, and the greater the amount of bonds owned by the trust the greater the depletion would have been. It does not appear that Rust at any time purposed making a profit to himself in this matter. He advanced his own money when the court would not permit him to use the trust funds. He was entitled, clearly, under the circumstances, to reimburse himself out of the avails of the Asheville property for the money so advanced, before accounting for any part of it to the trust fund. Aside from the $524.26 which will be considered later, his conduct respecting the bonds, from first to last, in any view we can take of the evidence, was without prejudice to respondents.

The circumstance that, before the proceedings were taken to obtain authority to sell the bonds with other worthless matters, the receiver requested his attorney to have the bond account transferred to him and that his wish was accomplished in the manner indicated, which is pressed upon our attention as quite conclusive evidence of fraud, and presumably greatly influenced the learned trial judge, seems, under the circumstances, to indicate to the contrary. Its influence upon the mind may be various, according to whether viewed through the coloring of a belief, more or less firmly fixed, that there was a fraudulent purpose ruling all the proceedings of the receiver and his attorneys, or viewed from the standpoint of judicial rules, the presumption of innocence being in the balance on the one side, and the searcher after truth looking for evidence of fraud outweighing such presumption and its supports. The bonds were necessarily to go into the hands of some one if the receivership matter was to be closed up. No person would take them and reimburse Rust for his outlay in trying to collect them. There was a faint hope that something

might yet be realized out of the pending litigation. How natural it was that Mr. Rust should desire to possess the bonds, and how appropriate it was that his desire should prevail if the rights of the creditors were in no wise prejudiced! The worthless securities, with other worthless matters, were sold at public vendue by order of the court in the ordinary way of disposing of such property preparatory to closing up a trust for creditors, whether in bankruptcy, in a receivership administration, or in an ordinary assignment for the benefit of creditors. At the sale the situation of the bonds was fairly stated and the sale fairly made. So far as appears there is no claim that can be seriously made, that the bonds were then of any considerable value. After the sale, with a full explanation to the court, it was confirmed, and the receiver, by permission of the purchaser, authorized to turn the bonds over to the party equitably interested therein, whose rights were protected at the sale. That such person was Mr. Rust, it seems the learned court must have understood. True, Mr. Rust in this way possessed himself of the bonds, but he did it, in effect, after they had passed by a fair sale to Mr. Thomas. If it were true that the learned circuit judge was induced to allow such course to be taken because he was deceived, the case might be different. But it seems clear that he must have understood the situation, as Mr. Frawley testified. We cannot look at the failure to call him as a witness, as it seems the learned trial court did. Counsel for respondents now argue with confidence, that since appellants were charged with fraud, it was up to them to call the circuit judge and use all means within their reach to exonerate themselves. We cannot think so. The fact that appellants were charged with fraud did not call upon them to disprove it. They rested their case, on the subject of the knowledge of the circuit judge, on the positive evidence of Mr. Frawley; and numerous circumstances corroborated the same, with substantially nothing to impeach it. To call in the former circuit judge

under the circumstances was not necessary from their standpoint, but was highly important from that of respondents. The latter's attitude indicates that it was deemed immaterial whether the judge acted understandingly or not. If the latter, the evidence of Mr. Frawley was false or the judge was inexcusably inattentive to what was occurring almost under his eyes. If the former, so much the worse for the judge.

In reaching the foregoing conclusion we fully appreciate that a person, acting in a fiduciary capacity, whether he is a guardian, administrator, receiver, or other trustee, can at the best obtain but a voidable title by purchasing the subject of the trust of himself, whether he acts directly or indirectly in the matter. We are not disposed to look with any favor whatever upon any act which has the appearance of violating that salutary doctrine. *In re Taylor Orphan Asylum,* 36 Wis. 534; *Pittsburg M. Co. v. Spooner,* 74 Wis. 320, 42 N. W. 259; *Hutson v. Jenson,* 110 Wis. 26, 40, 85 N. W. 689; *Ludington v. Patton,* 111 Wis. 208, 239, 86 N. W. 571; *Heyl v. Goelz,* 97 Wis. 327, 72 N. W. 626; *McCrubb v. Bray,* 36 Wis. 333; *Melms v. Pabst B. Co.* 93 Wis. 153, 66 N. W. 518. However, it does not apply where the trustee has a legitimate interest of his own to protect and his course upon full explanation to the court has been approved. *Scholle v. Scholle,* 101 N. Y. 167, 4 N. E. 334. Nor does it prevent the trustee from purchasing from his vendee, there being no understanding in that regard prior to the sale. *Welch v. McGrath,* 59 Iowa, 519, 10 N. W. 810, 13 N. W. 638; *West v. Waddill,* 33 Ark. 575, 585; 1 Perry, Trusts, § 195; 2 Woerner, Am. Law of Adm'n, 1086. Furthermore, where the trustee has a legitimate interest in the property as in this case, having in good faith and properly advanced money thereon before the sale, the rule is not so stringent as to permit the sale to stand and at the same time punish the purchaser by compelling him to pay for the property to the *cestuis que trustent* regardless of his equity. *Elliott v. Pool,* 59 N. C. (6 Jones Eq.) 42.

Appeal No. 2.

Appeal of the *Chippewa Valley Bank,* W. A. and *A. J. Rust,* executors, and *George T. Thompson.* Three distinct matters are involved. We will designate them, for convenience, a, b, and c.

a. The trial court's view as to this is indicated in subdivisions 175 to 183 inclusive, and 195 to 200 inclusive, as to facts, and 12 as to law, in the statement preceding this opinion. The general result, in addition to that stated in Appeal No. 1, is that the receiver, in collusion with the bank and *George T. Thompson,* its agent, used $524.26 for their own benefit in handling the Asheville matter, the receiver charging the same to himself, Shaw, and *Thompson* in the first place with the knowledge, consent, and connivance of his associate, *Thompson,* who was the bank's agent, all concerned knowing that the interests of the trust were not involved, and in the end by falsely representing the character of the account to the court, obtaining an order authorizing the asset to be charged off to expense or loss account.

The facts as to how the receiver came to deal with the Asheville matter personally, as heretofore determined, will be considered verities for the purposes of this appeal. We find nothing in the evidence warranting the finding of the court that there was a fraudulent conspiracy in respect to the matter. The bank had no connection with it except through *Mr. Thompson,* and he had no connection with it except as the bank's representative. There is no reason that we can perceive, according to the principles governing judicial investigations, why *Mr. Thompson's* positive evidence on this point should not be believed. It is corroborated by the circumstances in the case, and not impeached so far as we can discover. According thereto he did not deal with Mr. Rust as receiver in respect to the Asheville matter; he dealt with him personally, with the understanding that the court would not

permit trust funds to be invested, and that he was not a party to any such use in a representative capacity or otherwise. The circumstances substantially all corroborate that. As a general thing, all the money expended in the Asheville matter was advanced by the bank through *Mr. Thompson* and subsequently prorated between the bank, or himself as its representative, Mr. Shaw, and Mr. Rust, the latter being understood to represent five twenty-sevenths of the bonds.

The particulars of how the money in question came to be paid by Mr. Rust and charged as before indicated, in addition to what has been stated, appear to be these: The account covers the period from August 3, 1893, to July 30, 1895. Excepting the first charge of $25, and the last four charges aggregating $19.36 it consists of wages and expenses of W. E. Smith covering a period for some three months prior to July 5, 1894. He was the receiver's employee, looking after receivership matters in various parts of the country and otherwise assisting in the performance of the receiver's duties. He was especially familiar with the Asheville matter. He paid attention thereto to a considerable extent while the plant was being disorganized and the machinery disposed of, rendering his bills for wages and expenses to the receiver as his regular employer. Some money was advanced to him by *Mr. Thompson* as the agent of the bank, which was returned by Mr. Rust.

August 6, 1894, which was prior to the receipt by Mr. Rust of any money out of the Asheville matter, he separated the expense accounts rendered him by Mr. Smith into that pertaining to the Asheville matter from the balance, being $479.90, and charged the same in four items, with full explanation thereof, to himself, *Thompson,* and Rust. That, with the $25, and $19.36 aforesaid, likewise charged, makes the $524.26.

At the time of the aforesaid occurrences the receiver, as such, was interested in nearly all the Asheville bonds. He held $2,500 of them absolutely, and was the owner of the

$11,000 held by the bank and Mr. Shaw, subject to their claims thereon. The indebtedness to Shaw and the bank, secured by the collateral, was provable against the trust fund regardless of the security, as we shall hereafter see. Five twenty-sevenths of all that could be obtained out of the results of the foreclosure, over and above the expenditures in realizing, and the same proportion of all the sums collected out of the supposed personal liabilities of the officers and stockholders of the proprietor company at Asheville, after reimbursing Mr. Rust for his personal outlay, belonged in equity to the trust fund, and Rust so understood it. Suits were pending to enforce such liabilities, with hopes of success based on the advice of eminent counsel. Under all these circumstances the expenditure might well have been authorized by the court out of the trust fund. If, without authorization, under ordinary conditions, it had been charged to the receivership expense account subject to the approval or disapproval of the court when the matter should be brought to its attention, there would have been in the transaction no evidence of fraud, nor evidence, even, of bad judgment. The fact that these matters, which came to the receiver mixed up with others which were unquestionably chargeable to the expense account, were paid before he received any money from the Asheville matters, and were carefully separated from such other matters and spread upon the books as an asset, is inconsistent with the finding of fraud when correct legal principles are applied thereto. Unless the circumstances characterizing the subsequent turning of such asset into a liability are sufficient to warrant such finding, or, looking backward at all the circumstances shown by the record as they will appear at the end of our considerations, it shall appear that the finding of fraud is sustained, it cannot be. The fact, if it were a fact, that the receiver, when he made the expenditure, expected that he would ultimately make the same a charge against the trust funds, without reasonable ground to expect that it would

be balanced by money received into the fund or through his assuming personal responsibility in pursuing such matters, would not of itself necessarily indicate fraud. The idea of the law entertained by the learned trial court on this point, which doubtless was largely a controlling factor in reaching the conclusion attacked, cannot be approved, but we will speak of that at length later.

The circumstances characterizing the conversion of the asset into a liability are these: As before seen, on May 28, 1897, the preliminary report of the receiver, looking to a final closing-up of his trust, was verified, and a few days later it was placed on file. It showed a large amount of accounts receivable, most of which came to the receiver from the National Electric Company, which were of little or no value, but which it was necessary to dispose of in some way in order to close the trust. In addition, there was a class of accounts receivable created by the expenditure of moneys, sometimes under the direction or with the consent of the court and sometimes not, in the completion of contracts for the installation of electric machinery made by the electric company, which contracts were properly hypothecated by it before any trust for creditors was impressed thereon, and which contracts were unfinished at the time the receivership commenced, and the expenditure of money in other ways by the direction of the court or otherwise, in collecting hypothecated accounts,—and charging such expenditures to the holders of the collateral, but without any relations between the receiver and such holders rendering the latter liable to pay the same. Charges were so made, as it would appear in some cases, as a method of keeping account with the transactions, the amount being deemed a preferred claim upon any money that might be realized out of the collaterals, and in others because of doubt as to whether the sum was proper receivership expense, but in no case because of a request, express or implied, by the persons charged, to make the expenditure for them. One of such accounts was the $524.26.

It was necessary in order to close up the receivership to dispose of such accounts by making a sale thereof, or by collecting the same, or by charging the same to expense or loss and gain account. They were not collectible, nor was it proper to sell them for the reasons stated. They were either chargeable to the receiver or to his expense or loss and gain account. He went through the form of demanding payment of the apparent debtors, but payment was refused, as was evidently expected. The proceedings in that regard seem to have been taken, and not improperly, to create proof that the accounts did not represent legal liabilities though such in form. Thereafter, when the general situation was familiar to the court, a petition was prepared by the receiver's attorney, Mr. Frawley, verified by the former, and presented to the court, for an order authorizing the closing out of such accounts by treating the same as matters of receivership expense or loss. The number of such matters was quite large. The manner adopted in presenting the subject to the court was to describe several of them, six in all, including the one in question, and to ask for authority to charge the same off as expense or loss, and to treat all similar accounts in that way. The representation made in the petition as to the $524.26 was this:

"Prior to the appointment of said receiver as aforesaid, the National Electric Manufacturing Company had a contract to install certain electrical machinery at Asheville, North Carolina, and the same has been assigned to Messrs. *Thompson,* Shaw, and Rust, as collateral security for moneys loaned and advanced to said National Electric Manufacturing Company; in moving the machinery from Asheville, and minor details of said plant, the sum of $524.26 was expended necessarily."

In respect to the claims generally, this was said:

"None of the parties against whom said accounts exist, and to whom they are charged . . . received any benefit directly, but were incidentally and indirectly benefited, in that the expenditures enabled them to realize *some amount of their collateral;* but that the items of expense were small as com-

pared with each of the amounts evidenced by the contracts existing therefor, and at the time such expenses were so incurred it was believed *that some margin might be obtained,* and that, in addition to paying the indebtedness due to said several parties, *a surplus would be obtained to the estate.*"

"Said several parties insist that such items are not justly chargeable to them, but that each should be paid out of the surplus *that might or may be received upon the said several matters,* and that it was for the benefit of your petitioner's estate that each be so paid."

"Each of said claims should be adjusted and settled with said parties, so that the said individuals aforesaid be released from all liability, and that said items be by him charged up to expense or other suitable account."

An order was entered in accordance with the receiver's suggestion. Of course it was not true that an indebtedness on contract, growing out of the installation of the Asheville plant, was assigned to Rust, Shaw, and *Thompson* as collateral to a loan made by them before the receivership commenced. It was true that an indebtedness accrued on contract for such installation, and was covered into bonds secured upon the Asheville plant, and was then, in the main, so turned over to Shaw and the *Chippewa Valley Bank,* which *Mr. Thompson* represented. It was true that by reason of the facts heretofore stated, at the time the expenditures were made, Rust was united in interest with Mr. Shaw and *Mr. Thompson* as the representative of the bank, to the extent of his personal expenditures to recover upon the bonds. He had a legitimate interest in the bonds under the circumstances. He was to that extent in substantially the same position as *Thompson* and Shaw, and they were in substantially the same situation as they would have been had they held as collateral the original contract liability for the installation of the Asheville plant instead of the bonds which were substituted therefor some two years before the receivership commenced. The $524.26 was expended necessarily for the purpose stated in the petition; that is, as regards realizing on the indebtedness

created by the original Asheville contract in its form as an indebtedness upon the Asheville bonds; not necessarily in the sense that it was necessary to take the money from the trust fund—and that is not the fair interpretation of the language of the petition when considered in all its parts—but necessary in the sense of what was required to conserve the interests of all who were concerned in the indebtedness held by the parties as collateral. In effect, when the expenditure was made, the three parties, as regards the trust, had a status the same as that of the other persons named in the petition, and as described. The person who drew the petition was negligent. That conclusion we cannot escape. But we see no good reason thus far, under all the circumstances, to hold that he or the receiver were guilty of any greater fault, or that the *Chippewa Valley Bank* or its agent, *Thompson,* was concerned in the matter at all.

The record, at and about the date of the order, showed that the Asheville indebtedness was on bonds, not on contract. Mr. Frawley was not so stupid as to intentionally present three petitions to the court substantially at the same time, followed by a carefully drawn report of a sale a few days thereafter, speaking of the Asheville indebtedness as being on bonds in three of the presentations, and bringing the matter so sharply before the court that it could not well have failed to be appreciated, and in the other speaking of such indebtedness as existing on contract. Nor can we believe the court was so blind as to sign two orders on the same day, and probably at the same time, one mentioning the Asheville indebtedness as existing on bonds and the other on contract at the time the receivership commenced, appreciating that indebtedness in the one was the indebtedness named in the other, and a few days afterwards to sign another order inconsistent with those two. The burden of the petition related to expenditures in respect to hypothecated choses in action of a particular kind,—indebtedness upon contract. That was

the subject undoubtedly in the mind of the person drafting it. The $524.26, except for one circumstance, was governed substantially by the same principles as the others spoken of in the petition. That they should all have been put in the same class is at least excusable. That the one should have been so misdescribed, while indicative of negligence, is not to be wondered at when we see in the deliberate finding of the conscientious court, in dealing with a multitude of matters, mistakes quite as bad. True, if the receiver had kept from the knowledge of his judicial director the true amount of the bonds, as was here found, but with which we cannot agree, and made a profit of $1,400 in dealing therewith, as also found but for which we find no support, the matter would look different.

This language in the petition seems to have had much influence with the trial court in finding the element of fraud:

> "Said several parties insist that such items are not justly chargeable to them, but that each should be paid out of the surplus that might or may be received upon the said several matters, and that it was for the benefit of your petitioner's estate that each be so paid."

We are asked to believe that the attorney who drew the petition, and the receiver who verified it, intended by that language to convey the idea that the parties against whom the accounts appeared claimed that the same should be paid out of the surplus to be yet received out of the hypothecated matters, notwithstanding the petition informed the court that the "said several matters" had been entirely closed out or were worthless. The indications are that the learned trial court gave weight to that idea to a considerable degree. We cannot do so. The meaning of the language is obscure; but with its context, when we apply the whole to the subject under consideration, it seems clear that the idea intended to be expressed is that, when the expenditure was made it was believed a surplus would be realized for the trust fund

and that the parties interested thought they were not justly chargeable and that the items should be paid as originally intended, or, if there were no surplus, that they should take the proper course in such cases, and that in the judgment of the receiver such idea should prevail. If we can get any sense out of the language it is not that which is pressed upon our attention. The idea that the petitioner intended the court to understand that it was for the interests of the estate that the items should be paid out of the surplus that had been realized or might be realized from the collateral, which the petition showed was in fact of little value at any time, and at the time of making the petition of no value at all, does not strike us as even possible.

Our conclusion is that the court may probably have been misled as to the character of the account in question, and that otherwise he probably would have denied the petition as to the matter in question, compelling the receiver to charge himself therewith and take his chances of reimbursement from the source he was dependent upon as to other moneys he had advanced in the Asheville matter; that his account should be surcharged to that extent; but that *Thompson* and the bank are in no way liable; that looking at this matter by itself, relief should not go further; that the evidence, so far, will not sustain the finding of fraud; and that, unless a general view of the whole case will change the situation, neither the bank nor *Mr. Thompson* is liable.

The idea advanced by counsel—that, the charge against Rust and his associates being that they fraudulently appropriated receivership money, the cause of action must fall with failure to establish fraud—cannot prevail. The real cause of action is to administer all property for the benefit of the creditors of the National Electric Company properly applicable thereto. The element of fraud has no significance except to raise a trust by construction. Constructive fraud is as effective as actual fraud. Again, a court of equity having

jurisdiction of the whole matter upon a sufficient complaint made in good faith, if the proof fails to show a liability to account on the particular grounds alleged, but does show that the party charged has money or property that should be accounted for to the trust fund, it will not send the parties out of court or let the defendant go free, but will enforce his liability by the proper order or judgment. *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55.

The further idea advanced by appellants' counsel, that by the death of Mr. Rust the action as to him abated, cannot prevail. The claim against the personal representatives, in any view of it, is not a mere action for damages disassociated from property. In one sense it is for the recovery of personal property or for damages to personal estate, and survivable under sec. 4253, Stats. 1898. *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Lane v. Frawley,* 102 Wis. 373, 78 N. W. 593. In the proper aspect the cause of action is for an accounting, which survives at common law and is enforcible against the personal representative. *Whittemore v. Hamilton,* 51 Conn. 153; *Wilby v. Phinney,* 15 Mass. 116; *Hazard v. Durant,* 19 Fed. 471; *Reyburn v. Mitchell,* 106 Mo. 365, 16 S. W. 592; *Hook v. Dyer,* 47 Mo. 214; Hill, Trustees, *303. The general rule is that the maxim, *Actio personalis moritur cum persona* (A personal action dies with the person), where property is involved, does not apply in cases of equitable cognizance, and that remedies in that regard which would exist against a decedent if he were living, exist against his personal representatives. *Schley v. Dixon,* 24 Ga. 273; *Reed v. Copeland,* 50 Conn. 488; 3 Redfield, Wills, ch. 10, § 40.

Many of such actions are covered by our statute, sec. 4253, Stats. 1898, which is supplementary to common-law survivorships. It may safely be stated as a rule without exception, that whenever an action would lie against a trustee if he were living to account for the subject of the trust, his personal rep-

resentatives may be held if they have come into the possession of the trust fund or property out of which it could be satisfied if the trustee were in being.

b. The next matter involved in this appeal is $184.97. The facts, as found by the court, are contained in findings 191 to 192 of the statement, and are to this effect: Prior to the commencement of the receivership, when it was competent to do so, the National Electric Company assigned to the *Chippewa Valley Bank* as collateral security, an indebtedness to it of $9,000, and an account against the National Electric Manufacturing & Construction Company of New York of some $6,000, and during the receivership, with knowledge that nothing could be collected thereon which would come into the trust fund, the receiver expended $184.97 in attempting to collect the same. On the theory running all through the case, that expenditure under such circumstances must necessarily be fraudulent, and that the persons holding the collateral, knowing of such expenditure and consenting thereto by not objecting, were necessarily guilty participants, the conclusion was reached that the receiver, the *Chippewa Valley Bank,* and *Mr. Thompson,* were liable jointly.

In this matter the learned trial court made as grave a mistake as to the facts as was made in the petition we have just reviewed; and also seriously erred in applying the law to the facts as found.

The undisputed evidence as to the expenditure in question is to this effect: The account against the construction company was validly assigned to the *Chippewa Valley Bank* as collateral. While efforts were being made to collect the account, in the right of the debtor, whose property was in the hands of a receiver, the latter became a party to the proceedings against the National Electric Company by filing a claim therein for $29,746.78. It became necessary to obtain evidence in New York, in the form of depositions, to be used in resisting such claim. The expenditure in question was

made for that purpose. The depositions were duly filed. A trial was had in respect to the claim, the *Chippewa Valley Bank,* as an interested party, taking part in the proceedings, which were all conducted, however, upon the part of the receiver, by his attorney, Mr. Frawley. The depositions so filed were used on the trial, and the result was a decision and judgment in favor of Mr. Rust for costs. The record shows the filing of the claim December 18, 1893, seasonable filing of objections by the receiver, subsequent entry of an order for formal pleadings, filing of an answer by the receiver in accordance therewith, it being entitled in the receivership action and signed by T. F. Frawley, attorney for the defendant and receiver, a reply thereto in due form, by the claimant, proceedings for bringing the issues thus formed to a trial, a trial before the court in March, 1895, and a judgment on the 12th day of such month, deciding the issues and decreeing judgment as before stated. Evidence was given, explaining the items, making the $184.97, the same being $157.73 for services of Countryman & Deboys, and $27.24 fees of Seamore & Hopkins; and that when the matter of paying the same was brought to the attention of the receiver, because of the interests of the *Chippewa Valley Bank* in the matter he declined to pay the charges, and paid them only after referring the matter to his attorney.

It needs no argument to show that the outlay was proper receivership expenses. We cannot believe that the learned trial court considerately found otherwise. It could not well be understandingly found that expense of resisting a claim against the trust fund under the eye of the court, expense that he could not have avoided without abuse of trust, was fraudulently or wrongfully paid out of the trust fund because the *Chippewa Valley Bank* was also interested in the matter. This matter, we apprehend, was confused in the judicial mind, by the dealings with a multitude of things in the final closing-up of this case, in another class of expendi-

tures, receiving much attention during the trial, and necessarily so, with the court's view of the matter, in framing the findings.

But if the facts were that the expenditure under consideration was made to enforce the collateral with knowledge that no surplus would come out of the same to be added to the trust fund, it would by no means follow that it was wrongful. We do not understand the law to be that a receiver must abandon all assets belonging to the trust because he only holds a right thereto subject to the claim of a creditor so large as to exhaust it. Such a rule would lead to the greatest confusion in the administration of trusts of this character. If a receiver must entirely abandon a chose in action because it is incumbered by a mortgage, so to speak, to secure an indebtedness of the insolvent, he must do the same with any other kind of property. If a horse or any other tangible thing comes into his possession or control, subject to such an incumbrance, he cannot take any proceedings at the expense of the trust fund to the end that the full value of the security may be realized, without being liable to be charged with a fraudulent expenditure of trust funds. The mere statement of the proposition, and its unavoidable consequences, shows its utter absurdity.

The trial court reached the conclusion we must condemn, evidently upon the theory that only the amount of a secured claim against a trust estate in the hands of a receiver, less the value of the security, concerns the receiver. Even that would not necessarily condemn as fraudulent, or wrongful, expenditure from the trust fund in the interest of securing as great a reduction of the secured debt by the collateral as possible; because the holder thereof is not bound to have his collateral valued and applied upon his claim, nor is he bound to exhaust his collateral and confine his claim against the trust fund to the balance. True, there is some conflict in the authorities on this, but the better rule, it seems, and the only

one that can be enforced without trespassing upon the constitutional right of property, is that every creditor of an insolvent, whose property is in the hands of a court receiver for the benefit of creditors, has an equal right with every other creditor in any general distribution that may be made of the trust fund. His right in that regard becomes vested when the creditor relation is established. Every contract right includes, by implication, the law for its enforcement, existing at the time of its inception. *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, 76 N. W. 359; *Bronson v. Kinzie,* 1 How. 311. A creditor, having a vested right to the property of his debtor generally for the collection of his claim, does not lose or impair it by taking security. Having such right, he does not lose or impair it by the circumstance that a receiver stands in the place of his debtor. He may prove his claim to the full amount and share with all other creditors on the basis of the face thereof in every general distribution of trust funds, till such time as, with the dividends received and the proceeds of his security, he shall have received full payment; and if there is then anything left of his security, it will belong to the trust fund. He is entitled to all the advantages of his position as a general creditor, and all the advantages accruing out of holding security, because such was the contract with the debtor.

The general equitable doctrine stated in *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N. W. 243, does not militate against what has been said; nor does the doctrine, rightly understood, that when a creditor has two funds of his debtor available for the payment of his claim, while to a general creditor only one of them is available, equity will compel resort by the first creditor in the first instance to the fund in which his right is exclusive,—since such principle is not applicable to situations that will prejudicially affect his contract rights. This court has spoken most decidedly upon that subject. *In re Meyer,* 78 Wis. 615, 623, 48 N. W. 55. A

misapprehension of such principle and a failure to take note that the restriction upon the right of secured creditors in bankruptcy proceedings, as to participating with general creditors in the distribution of the trust fund, is statutory, has led to most of the decisions to the effect that, in the settlement of the affairs of an insolvent through proceedings under a creditors' bill, secured creditors can prove their entire claims and share in the distribution of the fund on that basis only upon surrendering the security. The general rule is to the contrary, as the following authorities will amply show: *In re Meyer, supra; People v. Remington,* 121 N. Y. 328, 24 N. E. 793; *Allen v. Danielson,* 15 R. I. 480, 8 Atl. 705; *West v. Bank of Rutland,* 19 Vt. 403; *Findlay v. Hosmer,* 2 Conn. 350; *Logan v. Anderson,* 18 B. Mon. 114; *Citizens' Bank v. Patterson,* 78 Ky. 291; *Miller's Appeal,* 35 Pa. St. 481; *Patten's Appeal,* 45 Pa. St. 151; *Brough's Estate,* 71 Pa. St. 460; *Smith's Appeal,* 74 Pa. St. 191; *Graeff's Appeal,* 79 Pa. St. 148; *Jamison's Estate,* 163 Pa. St. 143, 29 Atl. 1001; *Moses v. Ranlet,* 2 N. H. 488; *Drew v. McDaniel,* 60 N. H. 481; *Bank Comm'rs v. Security T. Co.* 70 N. H. 536, 49 Atl. 113; *In re Bates,* 118 Ill. 524, 9 N. E. 257; *Furness v. Union Nat. Bank,* 147 Ill. 570, 573, 35 N. E. 624; *First Nat. Bank v. Comm. Nat. Bank,* 151 Ill. 308, 37 N. E. 1019; *Levy v. Chicago Nat. Bank,* 158 Ill. 88, 42 N. E. 129; *Friedlander v. Fenton,* 180 Ill. 312, 54 N. E. 329; *Lewis v. United States,* 92 U. S. 618; *Merrill v. Nat. Bank,* 173 U. S. 131, 19 Sup. Ct. 360; *Aldrich v. Chemical Nat. Bank,* 176 U. S. 619, 20 Sup. Ct. 498; *In re Crystal Springs Bottling Co.* 96 Fed. 945.

An examination of the authorities cited will show plainly that the few exceptions to the rule here adopted grew out of either a misconception of the proper application to be made of the equitable rule as to the rights of parties in a fund where two have a legal right thereto as security and one has also another security; or the adoption of the bankruptcy rule,

either by special statute, or in failing in the beginning to comprehend that the latter rule is wholly statutory. As to the equitable rule mentioned, the Illinois court said in *Friedlander v. Fenton, supra:* "It will not be enforced where it operates to the prejudice of the party holding the double interest."

The Rhode Island court at first, through mistake, adopted the bankruptcy rule, but in *Allen v. Danielson, supra,* acknowledged the error and held that in a general trust for creditors their rights, regardless of security held by them, are measured by their respective claims at the time of the creation of the trust, and that so long as the relation of debtor and creditor exists they are entitled to participate on the basis of the face of their claims in the distribution of the fund. The rule was stated in *People v. Remington, supra,* after a full review of the authorities, thus:

"The creditor is entitled to prove against the estate for what is due to him, and to receive a dividend upon that amount. If the collateral securities are more than sufficient to satisfy any deficiency in the payment of the debt from the dividends, the personal representatives may redeem them for the benefit of the estate."

In *Merrill v. Nat. Bank, supra,* in a masterly opinion by Mr. Justice FIELD, in which the leading authorities in this country and England were reviewed, the rule thus stated was adopted. It was said to be the chancery rule, and that the other rule was wholly a creation of bankruptcy legislation. The prevailing rule in the absence of such regulations, or some statute, was stated thus:

"The secured creditor is a creditor to the full amount due him, when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any par-

ticular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require."

"When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

We must adopt that rule. It does not appear that this court has spoken very decidedly on the subject. The principle involved, though, was fully recognized in *In re Meyer, supra,—In re Bates* and other cases here cited being referred to.

c. The court's view of the evidence as to the third matter in this appeal is contained in subdivision 188 of the findings and 15 of the law appearing in the statement. In short it is this: The receiver, the *Chippewa Valley Bank,* and *George T. Thompson,* its managing agent, fraudulently converted to their own use $161.71, because the receiver, with knowledge of such agent, expended that sum in the collection of a collateral claim validly hypothecated by the electric company to such bank as collateral to the former's indebtedness thereto, all parties knowing at the time of such expenditure that no surplus could be obtained out of the collection for general creditors. The statement of the matter, in view of what has been said, shows without argument that the court's conclusion was reached by a misapprehension of the law. The disbursement appears to have been ordinary receivership expense,—expense of a kind that would be expected, under ordinary conditions, to be allowed by the court in passing his receiver's account, as a matter of course. The collateral claim exceeded to some extent—small, it is true—the principal debt. The

claim was large, however, being $1,800. It was against a perfectly responsible party, and was collectible to the full amount, as the receiver was bound to regard it, in advance, at least, of a full investigation and reasonable efforts being made by some one to collect it. The holder of the collateral had a right to throw the burden thereof onto the receiver by refusing to incur any expense in the matter and looking wholly to the trust fund, though still retaining the security.

The consideration for the collateral claim was electrical machinery. Complaints with reference thereto needed careful attention by some one familiar therewith in order to enable the parties interested in the collection of the claim to have any standing in regard thereto. In such circumstances the receiver sent his regular agent to look after the matter, and his wages and expenses constitute the expenditure in question. Had the receiver not done as he did, even without any order of the court to protect him, he might have been chargeable with breach of duty. Nevertheless he took the precaution to charge the expenses to the holder of the collateral and leave it that way till authorized by the court to charge the same to expense account. The charge to the holder of the collateral was not authorized by it. Neither the bank nor *Mr. Thompson,* so far as the evidence goes, when correct rules are applied thereto, had any connection with the matter rendering them or either of them liable.

Appeal No. 3.

Appeal of *Fitch Gilbert, John S. Owen,* the personal representatives of R. E. Rust, and those of D. R. Moon. This involves the question of whether appellants are liable for $2,642.24 expended in completing an assigned contract, and $187.90 for expenses incurred in endeavors to collect the same and an unincumbered claim against the debtor. The view taken of the matter by the trial court will be found in subdivisions 157 to 173 as to facts, and 11 as to law in the

statement. In short, the undisputed material facts are these: At the time the receivership commenced the electric company was in default on a contract to install an electrical plant for the Bucyrus Steam Shovel & Dredge Company, which it agreed to complete by December 15, 1892, and was under bond, with sureties, to do so or suffer a penalty of $50 per day, the sureties being R. E. Rust, *George T. Thompson,* and C. A. Daigh. The direct primary benefits to flow to the electric company were held by *George T. Thompson, John S. Owen, Fitch Gilbert,* and D. R. Moon, to secure them against loss by reason of their having indorsed a note of the electric company to the National Exchange Bank of Milwaukee for $12,000. The amount of the contract was about $4,750, and there had been expended thereon at the time the receivership commenced nearly $1,000 in excess thereof. Independently of such contract the Bucyrus Company owned the electric company $1,195.34. So far as appears, during the period covered by the expenditure in question, the contract claim and the other claim mentioned were collectible contingent upon the completion of such contract. The material for such completion, largely in a manufactured state, designed by the electric company for use in that regard, was on hand with the receiver. Substantially the only thing required, as was supposed, was a generator rated at $2,500. Mr. Rust, after his appointment, was importuned to complete the contract, by the holders of the collateral claim, they offering to become responsible for any expenditure in that regard for which they would be justly liable. The situation in regard to the contract was thereupon presented to the court by the receiver for advice, the value of the generator being placed at $1,500 and no statement being made that he was interested by reason of his position as surety for the completion of the contract. The result was that he was advised to ship the generator, to collect what was due upon the contract for the benefit of the holders of the collateral, except $1,500, and to retain that sub-

ject to the further order of the court. The generator was thereupon shipped, and thereafter, in efforts to satisfy the Bucyrus Company in respect to the plant, so that it would be willing to pay the amount due upon the contract, prior to November 16, 1893, other expenses were incurred, which, with the value of the generator, aggregated $2,642.24.

There came to the receiver from the insolvent a number of unfinished contracts and partly constructed electrical appliances, and some manufacturer's stock. He was ordered to continue the manufacturing business for a time for the purpose of enabling him to convert the partly manufactured electrical appliances and the manufacturer's stock on hand into money to the best advantage, and, impliedly, to finish outstanding contracts where the interests of the trust required it.

Prior to February 7, 1894, the Bucyrus contract was completed. There was then due from such company all that was collectible out of an expenditure of $5,710.09 made by the electric company, and $2,646.24 made by the receiver, and an indebtedness otherwise of $1,195.34, all of which it refused to pay, rendering judicial proceedings necessary to collect the same. This situation was brought to the attention of the court and authority asked for the receiver to proceed to collect the entire indebtedness, the claim of the holders of the collateral to be transferred therefrom to the proceeds thereof, they consenting. Authority was so granted. Appropriate proceedings were then taken by the receiver through his attorney, to collect all of said indebtedness, a lien being filed in that regard. Such proceedings were, with due discretion, so far as appears, pursued with effect so far as possible, and at the expense of the trust; but the claim proved entirely uncollectible.

When the generator was used, as aforesaid, it was charged to *Thompson, Owen,* and Moon, and was one of the matters charged off to loss and gain account pursuant to the order of June 2, 1897, aforesaid. The court, in the petition upon

which the order was granted, was truthfully informed of the facts as to the charge, showing that it did not constitute a legal or equitable liability against the apparent debors.

We are unable to discover in this history anything to warrant an inference of fraud or wrongdoing of any kind, when correct rules of law are applied thereto. The court found that all parties knew that nothing could be realized out of the Bucyrus indebtedness for general creditors when the expenditures were made to complete the contract and to make the collection. That seems highly inconsistent with the undisputed facts, that a large proportion of the indebtedness at the start belonged absolutely to the trust property, and that in the end about one half of all that could be collected under any circumstances so belonged, and that there was no evidence that the debtor would not or could not pay because of insolvency.

The court found, in effect, that the proceedings whereby the receiver took upon himself the burden of collecting all of the Bucyrus indebtedness in one proceeding was a scheme to which *Gilbert, Thompson, Owen,* and Moon were parties, in order to make the expense of collecting the collateral claim a burden upon the trust fund. The evidence seems plain that the course adopted was the only one to avoid two suits; one on the collateral, in which the trust was indirectly interested to a large amount and indirectly interested otherwise, and one on the claim for $1,195.34. The only orderly way was the one resorted to. The court would doubtless have directed proceedings to be so taken upon being fully advised, even against the protest of the owners of the collateral, so long as their rights were preserved.

The trial court viewed the situation as if any expenditure by the receiver to collect the collateral was necessarily fraudulent, both as to the receiver and the other parties interested in and consenting thereto. That was error, as we have seen.

The court further assumed that the expenditure of any

sum in the completion of the contract, in excess of that involved in the generator, was unwarranted, and under the circumstances fraudulent as to all concerned. That was clearly a misconception. The general order under which the receiver operated must have contemplated that he was to complete unfinished contracts where, in his judgment, the interests of the trust would best be subserved thereby. That suggested reasonably, in some cases, a moderate outlay without expectation of any direct addition thereby to the trust fund. In other cases it reasonably suggested the propriety of an expenditure to complete a contract, the outlay being treated as a proper claim upon the proceeds to be collected. Both of these situations were presented to the receiver for action, and his decision is not to be condemned merely because in the end the outlay led to a loss, especially when his action was approved by his judicial director and was as directed. We must test it by what might have been deemed reasonable at the time the expenditure was made, resolving fair doubts in favor of the receiver rather than against him. He was called upon to deal with many perplexing business propositions in getting something like order out of the confusion of things that came to his hands, and to determine whether there was any real substance therein for general creditors.

A receiver in the position occupied by Mr. Rust is by no means expected to abandon as a matter of course unfinished contracts. While he is not bound to finish them, or warranted in doing so where property of the trust fund would not be otherwise jeopardized, he is bound to investigate them, to pass judgment upon what is for the best interests of his trust under all the circumstances, or to act upon such judgment and take the chances of judicial approval, or take the advice of his principal in advance in respect thereto, and follow it. Wait, Insolv. Corp. § 214; Gluck & Becker, Receivers, 316; Smith, Receiverships, § 35; Beach, Receivers, § 378; *Florence G. E. L. & P. Co. v. Hanby,* 101 Ala. 15, 13 South. 343;

Blake Crusher Co. v. New Haven, 46 Conn. 473; *Cooke v. Orange,* 48 Conn. 409; *Sager Mfg. Co. v. Smith,* 60 N. Y. Supp. 849. Ordinarily a receiver would take serious risks in completing a contract of the insolvent at the expense of the trust where no property was to be saved thereby, because the court, as will be seen by the authorities, in such cases is not bound to approve even if it appears that such completion was for the best interests of the trust. But in case of a manufacturing industry like the one in question, where a general order is made for its temporary continuance for the very purpose, among other things, of finishing uncompleted contracts, where the interests of the trust seem to require it, it is expected that the details of executing the order will be passed upon by the receiver, other than in exceptional cases. Mere mistakes of judgment as to such details will not work to his loss, much less subject him to the charge of fraud, and his attorneys and all parties concerned with him as well.

Here there was not only an implied direction to complete unfinished contracts where it seemed for the interests of the trust to do so, which would have authorized finishing a contract under some circumstances where no property was to be saved thereby, but it particularly applied to cases where property belonging to the trust was incumbered, as in the case in hand, and the completion of the contract was necessary to save such property. In such cases a receiver might be guilty of a serious breach of trust by failing to give attention to the matter, especially in a situation where, as in this case, there was a special order to expend money to the amount of $1,500, which, of course, would necessarily be lost unless further expenditures were made so far as necessary to complete the contract and render the $1,500 collectible. In this Bucyrus matter, in 1893, when the expenditure was made, the receiver had a right to believe that the whole amount was collectible and that at the closing of his trust there would be a considerable dividend for creditors, and that the entire indebtedness

secured by the collateral might be represented in the distribution regardless of the value of the security, and the loss of the collateral be wholly attributable to him. He knew, if he was correctly advised as to this, and it seems that he was, that the holders of the collateral were not compelled to look to it primarily for their pay, or to do anything in regard thereto, except not to allow the same to be lost through their negligence.

We see no indication of fraud or negligence in the completion of the contract. Putting the generator in at $1,500 that had been rated at $2,500 has no significance. We speak of that particularly because counsel refer to it as a strong indication of fraud, and probably the trial court so viewed the matter. It is quite easy to understand how an electric generator, with the usual guaranty that goes with one, when put out by a going concern might be rated at $2,500 and be worth that, and the same machine, in the bankrupt stock of a concern not expected to resume operations,—an article of a sort that no other manufacturer would care to supply extras for or keep in repair, or would otherwise be interested in except to condemn it,—might not be worth $1,500. It is more than probable that the machine in question was not salable at that sum for cash when the petition was made upon which the order was entered, authorizing it to be used in completing the Bucyrus contract. Many other circumstances pointed to as indicating fraud might be referred to with like effect. Suffice it to say that there are none which we can discover, when properly analyzed and correct principles of law applied thereto, that change the situation above indicated.

Appeal No. 4.

Appeal of *Fitch Gilbert, James T. Barber,* and the personal representatives of R. E. Rust. For the trial court's history of this matter, in the main, we refer to subdivisions 187, 198, and 199 as to the facts and 16 as to the law, in our

statement. The further circumstances found by the court or appearing in evidence are contained in the following summary:

February 13, 1893, *Gilbert, Barber,* and Rust indorsed a note of $2,800 for the electric company, taking as security the liability of the St. Louis Light, Heat & Power Company for $3,000 upon a contract for the installation of some electrical machinery. Such liability matured only upon the full completion of the contract by the machinery being put in successful operation. The indorsers were compelled to pay the note. When the receiver was appointed the expense of installing the machinery, as was supposed, had all been incurred, except that of putting the same in successful operation. At the request of the purchaser the receiver sent an electrician to demonstrate the competency of the machinery to satisfy the terms of the contract. Before his efforts in that regard were completed the armature of the electrical machine burned out. The purchaser was a responsible party, and the collection of the $3,000 claim only awaited upon a satisfactory operation of the machinery. The receiver, about August 3, 1893, furnished a new armature, rated at $800, and incurred expense in regard thereto of $53.80 for freight. After the new armature was in place the machinery was not made to operate satisfactorily to the purchaser, the result being that, without fault on the part of the receiver, the entire original expenditure, and that for the new armature and freight were lost. The price of the new armature and the freight bill in regard to the same were charged by the receiver to the holders of the collateral. *Barber* and *Gilbert* did not authorize the same or the expense. In the petition upon which the order of June 2, 1897, referred to in previous appeals, was granted, the whole matter in respect to the $853.40 was explained to the court so far as it was material to do so, and an order was entered authorizing the account to be charged to loss and gain account.

The court found that when the expenditure was made Rust,

Gilbert, and *Barber* were all parties to it; that it was for their sole benefit; that they knew at that time that nothing could be realized for general creditors, and were guilty of a fraudulent appropriation of trust property. Those conclusions seem to be clearly against the law, as we have heretofore declared the same, and against the evidence. Why the positive evidence of *Mr. Barber* and *Mr. Gilbert* that they had nothing to do with the expenditure in question, unimpeached by any circumstance to the contrary, should have been ignored, is not perceived. It is equally difficult to perceive how the conclusion could have been reached that the purpose of the expenditure was for the sole benefit of the holders of the collateral, when the collateral in fact exceeded the principal debt, its collectibility, as it appeared at the time the expenditure was made, was dependent only upon the completion of the contract, the whole of the principal debt was provable in the receivership proceedings regardless of the security, and the expenditure was made in the early history of the receivership when it was reasonable to expect a substantial sum for distribution among creditors. It is equally difficult to understand how the conclusion could have been reached, that when the expenditure was made it was not expected that any benefit would grow out of the transaction for general creditors, when, from the standpoint of the receiver when the expense was incurred, both direct and indirect benefits to general creditors were apparent. It seems that a wrong conclusion was arrived at by overlooking or ignoring material credible evidence, the drawing of unwarranted inferences from undisputed facts, and a misconception of legal principles which we have heretofore discussed. There is no need to say more in respect to this matter.

Appeal No. 5.

Appeal of *Fitch Gilbert, George T. Thompson,* and the personal representatives of R. E. Rust. This involves six dis-

tinct matters, which will be treated under the heads of a, b, c, d, e, and f.

a. The idea of the trial court as to this, in the main, will be found in subdivisions 129 to 133 as to facts, and 6 as to law, in the statement. The following appear to be the undisputed facts: May 16, 1892, *Gilbert, Thompson,* and Rust indorsed a note of $8,000 for the electric company to the National Exchange Bank of Milwaukee, which was renewed with the same indorsers January 1, 1893, such indorsers taking as security an instrument whereby an attempt was made by the electric company to pledge to them as security an electric plant at Brookville, Indiana, said plant consisting of land and buildings and machinery therein, so circumstanced that all was real estate. The instrument was so executed as to show clearly the purpose thereof, but not so as to legally convey an interest in the property under the laws of Indiana or so as to be entitled to record under such laws. It was not recorded. May 18, 1893, the insolvent, without any new consideration, and upon the eve of its suspension to the knowledge of all parties concerned, made a mortgage in due form in place of the defective instrument, such mortgage being thereafter duly recorded. The mortgagees were compelled to pay the indorsed note about May 24, 1893, $8,164 being required for that purpose.

July 12th after the receiver was appointed, the history of the matter above referred to was brought to the attention of the court by petition, with information that the mortgage was about to be foreclosed; that the property was nonproductive and noninsurable; and that it was for the interest of the trust that it should be sold. That was accompanied by proof that the holders of the mortgage concurred in the judgment of the receiver, and consented to the sale as prayed for by him. An order of sale was thereupon entered, the receiver being directed to dispose of the property at public vendue in manner specified, unless at private sale the full amount of the mort-

gage indebtedness could be obtained. That was equal to the full value of the property. Subsequently a private sale was made in accordance with the order, ostensibly to *George T. Thompson,* for $8,287.30 in the form of a release of the indebtedness. A deed was made accordingly, and thereafter the sale was duly reported to the circuit court and confirmed. *Thompson* in fact bought the property in the interests of all the mortgagees, taking the title with the understanding that it was to be conveyed to a corporation to be formed, the stock to be distributed between the mortgagees according to their respective interests. That was subsequently done.

Upon such facts and others not necessary to be detailed, the court held that the attempted mortgaging or pledging of the property January 18, 1893, was *wholly* ineffective; that the instrument then executed was *wholly* invalid; that the one of May 18, 1893, was *wholly* without consideration, was made when all the property of the mortgagor was impressed with a trust for its creditors, and for the purpose of giving, and received for the purpose of obtaining, an unlawful preference over the general creditors of the mortgagor; that the subsequent proceedings were in furtherance of this fraud and a general fraudulent purpose as to the creditors of the electric company, and that by reason of the facts the persons so obtaining possession of the property became liable to such creditors for the full value thereof.

Many questions suggested as to this matter need not be discussed. It is not contended by appellants' counsel but that the secret interest of Mr. Rust in the purchase of the property was sufficient to invalidate it at the election of creditors; but it is contended by them that it was not permissible to treat the sale as valid and recover more of the receiver, or of him and those participating with him, than the actual damages which the creditors sustained, if any. That is elementary. The undisputed evidence is that they did not suffer any damage if the mortgage was a valid security, since the mort-

gage indebtedness was equal to the full value of the property. The result is this. If the mortgage was valid, then the judgment on this matter is wholly wrong.

The trial court's conclusion as to the validity of the mortgage rests on the finding that it was without consideration and taken for the purpose of obtaining an unlawful preference; and that rests on the finding that the attempted mortgaging of the property January 18, 1893, was *wholly* ineffective, and that the character of the second transaction was to be determined *wholly* by the circumstances existing at its date. In that serious error was committed.

The instrument of January 18th was made upon a sufficient consideration, and when it was perfectly competent for the electric company to mortgage the property as it attempted to do. That is not questioned. It was not a mortgage good at law, but was clearly an attempt to make such a mortgage, or to pledge the property as security. That is clear beyond reasonable controversy. It contained no unexplainable ambiguity as to the property intended to be mortgaged, or the debt or liability intended to be secured, or the parties. That made a good mortgage in equity. It could have been foreclosed as such, or perhaps regarded as a good contract to make a mortgage valid at law, and specific performance enforced. It was, then, a good consideration and justification for the mortgage of May 18, 1893. The latter act is no more than a court of equity would have compelled, if necessary, to protect the rights of the mortgagees. The instrument of May 18th related back to that of January 18th, taking effect in equity as of the earlier date. The fact that the first paper was not recorded when the receiver was appointed or the suspension of the electric company occurred, has no significance, since, of course, neither the creditors nor the receiver for them could take any better right to the property involved than the electric company had. The receiver did not stand in the position of a *bona fide* purchaser. An equitable mortgage is

as good as any as regards the mortgagor and every person dealing with him with notice of the facts, or any person claiming under him having no superior equities.

It follows that the rights of Rust, *Thompson,* and *Gilbert* are not referred, necessarily, to the instrument of May 18th, but to the attempt to make a mortgage January 18th prior thereto. It was on the latter as well as the former that the sale was ordered by the court, and it might as well have been ordered if the instrument of the later date had been entirely omitted from the proceedings. Thus it is seen that the foundation upon which the learned trial court rested the judgment as to the wrongful appropriation of the Brookville property is wholly wanting. The learned judge failed to appreciate that an attempt to make a mortgage, both parties intending to accomplish that result, sufficient being done in that regard, upon a valuable consideration, to enable a court of equity to discover with certainty the purpose of the parties, the terms of their contract, and the property involved, so as to deal with the matter, is a good mortgage in equity,—is just as good as any mortgage, so long as there are no superior intervening equities.

The law on this subject is well settled, as the following authorities will show: *Mowry v. Wood,* 12 Wis. 413; *Jarvis v. Dutcher,* 16 Wis. 307; *Dreutzer v. Lawrence,* 58 Wis. 594, 17 N. W. 423; *Dreutzer v. Baker,* 60 Wis. 179, 18 N. W. 776; *Flagg v. Mann,* 2 Sumn. 486; *Talieferro v. Barnett,* 37 Ark. 511; *Waddell v. Carlock,* 41 Ark. 523; *Bell v. Pelt,* 51 Ark. 433, 11 S. W. 684; *Peers v. McLaughlin,* 88 Cal. 294, 26 Pac. 119; *Daggett v. Rankin,* 31 Cal. 321; *Love v. Sierra Nevada, L. W. & M. Co.* 32 Cal. 639; *Remington v. Higgins,* 54 Cal. 620; *Higgins v. Manson,* 126 Cal. 467, 58 Pac. 907; *Gardner v. McClure,* 6 Minn. 250; *Howard v. Iron & L. Co.* 62 Minn. 298, 64 N. W. 896; *Payne v. Wilson,* 74 N. Y. 348; *Hale v. Omaha Nat. Bank,* 64 N. Y. 550; *Perry v. Board of Missions,* 102 N. Y. 99, 6 N. E. 116; *Sprague v.*

Cochran, 144 N. Y. 104, 38 N. E. 1000; *Hamilton T. Co. v. Clemes,* 163 N. Y. 423, 57 N. E. 614; *In re Howe,* 1 Paige, 125; *Knott v. Mfg. Co.* 30 W. Va. 790, 5 S. E. 266; *White Water Valley C. Co. v. Vallette,* 21 How. 414; *Watkins v. Vrooman,* 51 Hun, 175, 5 N. Y. Supp. 172; *Burdick v. Jackson,* 7 Hun, 488; *Price v. Cutts,* 29 Ga. 142; *Courtney v. Scott,* Litt. Sel. Cas. 457; Pingrey, Mortgages, 278; Jones, Mortgages, §§ 163–168; 3 Pomeroy, Eq. Jur. § 1237; Miller's Eq. Mortgages (45 Law Library) 1, 2, 216; Jones, Corporate Bonds & Mortgages (2d ed.) §§ 33–38.

We quote verbatim or in effect from the above authorities, showing how plainly the law as here declared governs the facts of this case:

"If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." Judge STORY, in *Flagg v. Mann, supra.*

The recital in a promissory note given for land, "This note is to stand as a lien on said land until fully paid," held to create a mortgage. *Waddell v. Carlock, supra.*

"An attempt to create a security in legal form having failed, equity will give effect to the intention of the parties and enforce the lien as an equitable mortgage. Any agreement that shows an intention to create a lien is in equity a mortgage." *Bell v. Pelt,* 51 Ark. 438, 11 S. W. 685.

"An imperfect attempt to create a mortgage upon specific property for the purpose of securing a debt, will create a specific lien upon the property so intended to be mortgaged." *Peers v. McLaughlin,* 88 Cal. 297, 26 Pac. 119.

"Every express agreement in writing, whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforcible. The form of the writing is not important, provided it sufficiently appears it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged." *Howard v. Iron & L. Co., supra.*

"An agreement based upon a valuable consideration to give a mortgage, will be treated in equity as a mortgage."

So an agreement or transaction good as an equitable mortgage, the transaction between the parties occurring when, as regards the rights of creditors of the mortgagor, a mortgage good at law might be given, is a sufficient support for the giving of a mortgage good in law within the time when disability would otherwise exist in regard thereto under the bankrupt act. The second transaction will take effect by relation as of the date of the equitable mortgage. The assignee in bankruptcy will take the property subject to the incumbrance. *Burdick v. Jackson, supra.*

The principle "is of frequent application under the bankrupt laws, where it operates to make valid a mortgage given to a creditor shortly before the filing of a petition in bankruptcy by the mortgagor, when this is done in pursuance of an agreement made at a time when the giving of the mortgage would not have been a fraudulent preference." 1 Jones, Mortgages, § 163.

"An equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity; and . . . an agreement for a mortgage is, in equity, a specific lien upon the land; and an equitable mortgage thus created is entitled to a preference over subsequent judgment creditors." Judge FOLGER, in *Payne v. Wilson,* 74 N. Y. 348.

The law as thus indicated prevails without exception in this country and England. Equity holds parties to their mutual intentions, when supported by a valuable consideration and sufficient definiteness that such intentions may be understood and the matter dealt with by equity jurisdiction. Therefore, an imperfect attempt to give a mortgage, which creates a good mortgage in equity, if perfected by the acts of the parties at a time when, by reason of the rights of the creditors, a good mortgage could not be made, will constitute a

mortgage good at law; and if not perfected till such time, equity will nevertheless regard the rights of the intended mortgagee as superior to those of creditors. So the learned court's decision that the paper made to R. E. Rust and his associates January 18, 1893, was not a valid mortgage in law, should not have led to the holding that it was of no force whatever and rendered all proceedings in regard to the mortgage given in lieu thereof May 18, 1893, fraudulent, and the result a fraudulent appropriation of property.

As before indicated, the participation by the receiver, as a purchaser at his own sale, however innocent it may have been—and we are constrained to believe that no wrong was in fact intended—rendered the sale voidable, and it might have been decreed void in this litigation, and such proceedings taken as seemed best to protect the rights of the respondents. But such rights only extended to the value of the property involved over and above the amount of the mortgage indebtedness, which, as it seems, was not worth seeking after. True, the rule cannot be stated too broadly or enforced too firmly, that a trustee can at best obtain but a voidable title by purchasing the subject of his trust at his own sale. Such a proceeding is voidable, as before indicated, at the election of the *cestuis que trustent* if they move seasonably, and that is so whether the sale was really injurious to them or not. The rule is established on those broad lines for the purpose of rendering inquiry into the real motives of the purchaser, or whether there was any real injury to the *cestuis que trustent* or not, unnecessary. It is one of absolute disability at the election of the adverse parties if they move seasonably. Gluck & Becker, Receivers, 284; *Heyl v. Goelz,* 97 Wis. 327, 72 N. W. 626; Perry, Trusts, 195. In this case the court might have treated the sale of the property as void and restored the former situation, or caused the property to be sold free from the incumbrance, using the proceeds to pay off the same and turning the surplus, if any, over to the trust fund, or treated

the holders of the title as trustees for the creditors and caused the property to be redeemed, or taken other courses that might be suggested, to protect the legal and equitable interests of the respondents. But, as whatever course that might have been chosen would have resulted, or that might now be chosen would result, in expense to both sides for the mere satisfaction of going through the form of compelling appellants to realize on their security legitimately, without adding anything to the trust fund, the better way, it seems, is to let the matter rest where the trial court found it.

b. For the trial court's idea of this, see 136 to 148 inclusive of the facts, and 8 as to the law, in our statement. It bears such close relation to the subject last treated that many of the facts in regard to it do not need to be restated. This is a fair summary, as the court viewed the matter:

At the time of the sale of the Brookville plant to *Thompson,* representing himself, Rust, and *Gilbert,* there stood, when corrected, charged on the books of the electric company in the receiver's hands against Charles B. Searrin, who had managed the property from the start for the electric company, $1,160.30. At the time of the sale Rust and *Gilbert* were familiar with this account, and had reason to believe that it represented a considerable sum of money belonging to the trust fund, that was obtainable. After the sale to *Thompson,* Searrin continued to operate the plant for the new owners, treating the old accounts as belonging to his new employer. He collected $862.37 out of such accounts, $305.87 of which was used for attorney's fees chargeable to the receiver, and the balance was knowingly appropriated by Rust, *Thompson,* and *Gilbert* to their own use in meeting the expenses of the Brookville business. The account on the receiver's books was included in the sale to Thomas, made under the order of June 2d, heretofore referred to, the entire account being lost to the trust fund.

We are unable to find any definite evidence showing with

any reasonable degree of satisfaction the facts thus found. The evidence shows that the account of $1,160.30 was constructed mainly before the receiver was appointed, by charging Searrin with his reports of earnings made by the plant and crediting him with his pay rolls for salaries and other disbursements, so that the balance indicated money on hand and uncollected bills. What amount was money and what amount was uncollected bills, and what part of the latter was of any value, did not appear. It further satisfactorily appears that Mr. Rust and his associates understood, so far as they knew anything about the matter, that substantially all the money represented by the account at the time of the sale was $520.38 in bank, under attachment. That is included in the $862.37 said to have been collected by Searrin, upon which credit is given of $305.87 paid as attorney's fees, which the evidence shows without dispute was not so paid, but was disbursed, $299.87 to pay attaching creditors, and $6 for expenses, which, with salary accounts chargeable to the bank fund, exhausted the same except $74.51. That amount, it is claimed, was at some time diverted by Searrin to the accounts of the new proprietor. We do not deem it important to state or discuss the details of the evidence in regard to it. Suffice it to say, if it were so converted, we find nothing bringing the matter distinctly to the attention of the parties charged until the trial of this action, and then nothing except the unsworn statements of Searrin. The report, however, made in respect to the matter in September, 1893, simply showed that after paying the attaching creditors, and expenses, and the salary bills chargeable to the fund, there was left in the bank account the sum named. There was nothing in the communication in respect to the matter indicating that the money was to be used for the new proprietors. It was not at any time transferred to the accounts of the new proprietors in an item of $74.51. It is claimed that at some time $30.60 of it was used to pay a freight bill, and the residue, $43.91, in June, 1894, was de-

posited as money of *Thompson* and his associates, this information being contained in Searrin's statements. The balance of the $1,160.30 account, over and above the bank balance as aforesaid, consisted of a sum of money assumed to be in Searrin's hands, determined in the manner hereinafter stated, and included bills to the amount of $478.78, of all sorts, $283.89 admitted to be worthless, and $140.50 in serious dispute at the time of the sale, and, if collected at all, not collected till some five months thereafter, leaving $54.39 unaccounted for. So, assuming that the $54.39 was collected by Searrin, and the $140.50 as well, and that the same was used for the benefit of *Mr. Thompson* and his associates, and that the $74.51 was likewise used—all of which is at best supported only by the unsworn statements of Searrin—we have but $269.40 that can be ciphered out as having been obtained out of the Searrin account of $1,160.30 and used for the benefit of *Thompson* and his associates. From this it is quite clear that such account was never supposed to be more than merely representative of what Searrin should account for by uncollected matters, expense bills, or cash; that it did not indicate an indebtedness to the amount of $1,160.30, or any other sum in particular, and was so involved at the time of the sale that it was probably regarded as of such trifling significance as not to be worthy of attention. Of the whole $1,160.30 there was only $54.39, in the old bills, which under the circumstances might have been considered doubtful, the $140.50 due from the municipality, which was in dispute, and the assumed amount of money in hand as aforesaid, or whatever there might be in fact, of such money, that there could have been any reasonable expectation, by Mr. Rust, that anything would come out of. This being the nature of the account, doubtless reliance was placed in Searrin to report and pay over any money coming out of the same which belonged to the receiver, such amount being considered in any event so small as to be of little significance.

Notwithstanding the character of the Searrin account was such that we discover no evidence of fraud in the fact that Mr. Rust treated the same as not worthy of his attention, we cannot acquit him entirely of negligence in not investigating it and securing from Searrin the benefits to the trust fund, whatever they were, which belonged to it. Any loss that occurred from such negligence should be charged to his legal representatives, which can be determined with any reasonable degree of definiteness from the evidence, the order of the circuit court of December 30, 1897, passing upon his account, not being regarded as any protection to him in that regard, since it appears that such matter was not brought understandingly to the court's attention.

We shall not take time to review at length the evidence in respect to all the details of this account. It seems to us undisputed that no knowledge came to Rust, *Thompson,* or *Gilbert,* until the trial of this action, at least, that any money had been realized out of the account and used in their business. They did not visit Brookville, and knew nothing about the business there, except what they gathered from Searrin's reports. None of such reports showed, definitely, that any of the receivership money was used in such business; and if they did, they were but the unsworn statements of Searrin as to his doing what he had no authority from his employer to do. Such reports failed to prove that any money belonging to the receiver came to the use of *Mr. Thompson* and his associates. No action could have been maintained against them on such proof as was made in this case. *Mr. Thompson* and *Mr. Gilbert* demonstrated by their own and other testimony that they did not obtain or use any of the receivership money, or have any information that any such money was used, except what they obtained from Searrin during the trial of the action; and we see nothing in the record to impeach their evidence.

The subject was brought into the action by amendment granted on the trial, the understanding being that a continu-

ance would be granted, if needed by appellants. Thereafter, it seems, an investigation was made by correspondence with Mr. Searrin, resulting in a statement by him that $74.51 was used in their business, and that $140.50 due for municipal lighting, included in the $478.78 of uncollected accounts, was collected in December, 1893, and was so used. Whether Searrin's unsworn statements are true or false does not appear. Standing alone, they do not show that any money belonging to the receiver was used at all for *Thompson* and his associates, much less do they show, against the sworn testimony, that any such money was used fraudulently.

The learned counsel for respondents does not appear to claim that the finding, as to $556.50 being collected of the Searrin account of $1,160.30 and misappropriated, is according to the evidence, but the amount is made up this wise: The $74.51, $140.50, and $54.39 before mentioned are assumed to be established in the manner before indicated, as having been misappropriated. Seventeen days' earnings of the plant in July, 1893, not included in the $1,160.30, computed at $157.34, less seventeen days' wages of Mr. Searrin and his assistant, $60.32, was assumed to belong to the receiver. In this it was thought there were no expenses for the period named other than for labor, that all of the service accounts should be counted as money, and that such accounts—not ordinarily deemed as earned till the end of the month—were apportionable and did not go with the plant by the sale. An estimate was made—from freight bills as to coal purchased, from statements made by Searrin respecting the average consumption of coal per day, and from coal bills showing the price paid for coal per ton,—that the value of coal on hand at the time of the foreclosure was $98.58. From that was deducted $71.66, which Searrin's communications indicated was owing for this coal at the time of the sale, leaving a balance of $26.92. From a general statement of Searrin's cash account from May 10 to August 11, 1893, items of cash

collections for May and June were taken, against which were credited expense vouchers for money paid from June 1st to July 10, 1893, leaving a balance of $161.14, and it was assumed that such balance represented money in Searrin's hands, without any bills outstanding to be paid out of the same. Lastly, $2 appearing by Searrin's statement to have been paid for recording the Brookville mortgage, was charged as part of the misappropriations. In this the following assumptions were made which it seems are not warranted: First, that the unsworn statements of Mr. Searrin prove what appears upon their face as to matters wholly unwarranted. We say "unwarranted" because we do not interpret the instructions from *Thompson,* to treat all the property as his as of a certain date, to include any money at that time in hand, or uncollected bills. Second, that the balance between May and June collections of $420.88, and vouchers paid from June 1 to July 10 of $200.34, leaving a balance of $161.14, should be regarded as free cash on hand, when it appears that the account was thus made up wholly by taking the items from Mr. Searrin's cash account before mentioned, wherein it appears that bills were paid so near to July 17, 1893, the date of the sale, that indebtedness must have existed prior thereto sufficient to exhaust the entire $161.14 except the sum of $5.36. The total debit in the cash account up to the time of the sale was $1,124.49. The credits up to and inclusive of July 22, 1893, were $598.75, leaving a balance of $525.74. Against that balance must be charged the $520.38 in bank under attachment, leaving the balance indicated, $5.36. It must be assumed in view of the way business is ordinarily conducted, and in the absence of any evidence to the contrary, that bills paid for supplies up to July 22, 1893, probably represented debts contracted considerably earlier than that date. Third, that the $54.39 of old bills were collected and used in the business of *Thompson* and his associates. Fourth, that there was $26.92 in coal on hand at

the time of the sale. Fifth, that the small amount of coal on hand for immediate use in operating the plant was not an incident thereof and did not pass therewith at the sale. Sixth, that the July service bills were apportionable and that there were no claims justly chargeable thereto except salary accounts. The items discovered by respondents' counsel make up the $556.50 found by the court to have been fraudulently appropriated, as thus appears:

Estimated coal, less freight charges	$ 26 92
Cash in hand	161 14
Municipal bill, collected	140 50
Uncollected bills treated as cash	54 39
Amount out of attached bank balance	74 51
Seventeen days' July earnings	157 34
Recording mortgage	2 00
	$616 80
July salaries, part	60 30
	$556 50

The following statement of the matter will exhibit definitely, and in proper form, we think, the manner in which the balance above indicated is arrived at. The above statement is in the form presented by respondents' counsel.

To part July earnings, 1893	$154 34	
Book accounts, old bills	478 78	
Bank account, attached	520 38	
Cash determined as aforesaid	161 14	
Coal on hand, at date of sale	98 60	
Recording Brookville mortgage	2 00	
		$1,418 24
By conceded worthless accounts	$283 89	
Coal bill	71 66	
Settlement of lien on bank account	306 87	
Back salaries	140 00	
Part July salaries, 1893	60 32	
		861 74
Balance		$ 556 50

It seems we should not pass this matter without demonstrating that the Searrin cash account from which respondents' counsel determined that Mr. Searrin had on hand at the time of the sale of the Brookville plant, $161.14, will not legitimately bear the treatment resorted to by them in sup-

port of the court's finding. Here is the account, balanced July 22, 1893:

1893			
May 10.	Balance in bank	$ 4 64	
May 24.	By freight, F. Geis, Agt.		$ 33 60
May 25.	Acct. Winefrede Coal Co.		139 90
May 27.	" wages, John Cleaver		5 50
May 27.	By miscellaneous acct. A. Bossert, Jr.		3 63
June 1.	Express, M. P. Hippard, Agt.		1 50
" 10.	Wages, F. Hermansdorfer		40 00
" 10.	Miscellaneous, Recorded Franklin Co.		2 00
" 10.	Miscellaneous, H. E. Balsley, Mgr. N. W. Tel. Office		1 63
" 10.	Freight, John Deitz, drayman		2 81
" 10.	Freight, F. Geis, Agt.		32 40
" 14.	Wages, Chas. B. Searrin		70 00
May 23.	To Consumers' Ledg. Acct. for St. lights from Dec. 1 to May first, '93	693 37	
June 10.	To Consumers' Ledg. Acct. Month of May	153 11	
July 10.	By wages, Chas. Searrin		70 00
" 10.	Wages, Frank Hermansdorfer		40 00
" 10.	To Consumers' Ledg. Acct. for Month of June	127 87	
" 10.	To Consumers' Ledg. Acct. St. Lights, month of May	140 50	
" 18.	By fuel Acct. Winefrede Coal Co.		71 66
" 18.	Oil and Waste, Standard Oil Co.		28 12
" 19.	Carbon Acct. Standard Carbon Co.		50 00
" 22.	Supplies, Eureka Tempered Copper Co.		6 00
Attached Bank account			$ 520 38
Balance			5 36
		$1,124 49	$1,124 49

While the balance of cash in hand, less outstanding claims, was not to exceed $5.36 at the time the plant was sold—it was probably less—it is more than likely that there were numerous small liabilities, in addition to those paid up to the date we close the account, which properly should have been paid out of any money available for that purpose. How just it is to include in the liabilities those paid within five days after the sale seems to be confessed by respondents' counsel in that one paid July 18, 1893, is treated by them as a proper charge in that regard in their treatment of the coal matter. It is no legitimate answer to this to say that late bills represent supplies on hand, because the moderate supplies for immediate use in the operation of the plant were as much a

part thereof as the tools and many other things that might be mentioned, not strictly speaking a part of the real estate.

The court, we must assume from the way the matter is presented here, obtained the item of $161.14 by taking from the above cash account three items on the debit side and nine items on the credit side, thus:

1893			
June 10.	To Consumers' Acct., May	$153 11	
" 10.	" " " June	127 87	
" 10.	" Street lights, May	140 50	
" 10.	By Express		$ 1 50
" 10.	" Wages		40 00
" 10.	" Recording		2 00
" 10.	" Mgr. N. W. Tel		1 63
" 10.	" Freight		2 81
" 10.	" Freight		32 40
" 14.	" Wages		70 00
July 10.	" Wages		70 00
" 10.	" Wages		40 00
	Balance		161 14
		$421 48	$421 48

That not only makes a misleading statement to the extent indicated, but is quite likely further erroneous in that the $54.39 of back bills, in whole or in part, are liable to be included therein, though still uncollected.

The foregoing lengthy analysis of the manner in which the court's finding as to the $556.50 must be supported, if at all, shows, it would seem, that at many points the finding is not supported by evidence at all, and that at others the evidence is altogether too vague to establish a legal liability, much less one of a fraudulent character. That seems too clear to warrant further discussion of the matter. We have studied the record in regard thereto endeavoring to look at all of the evidence legitimately bearing thereon, stating and restating the account to such an extent that it would not do to spread the evidence of all our labor upon the printed pages. The finding as to $556.50 having been collected out of the Searrin account of $1,160.30 may have been based upon a different theory than the one advanced by the learned counsel in sup-

port of it. We have been unable to discover what that theory was from the record.

It seems from the proceedings on the application for a new trial upon newly discovered evidence, that when the evidence was substantially all in as to this matter, the trial judge announced from the bench an opinion to the effect that, while there might be evidence of some receivership money having been used in the Brookville business after the July sale, there was no evidence that it was known to the purchasers, and that from such statement appellants' counsel supposed, as well they might, that no finding would be made against their clients of a fraudulent appropriation of money, and none made against them at all in respect to the matter for more than $74.51; and that, relying thereon, they did not ask for a continuance under the terms imposed upon respondents when leave was granted to bring in by amendment the new matter; that upon the finding being made as it was, they were taken by suprise, which seems most natural; that as soon as practicable a full investigation of Mr. Searrin's administration at Brookville was made, when it was discovered that his reports of uncollected bills, which largely led to the finding in question, were false; that the indications upon which the trial court largely relied, tending to show that receivership money was appropriated by Searrin to the use of *Thompson* and his associates, merely showed defalcations on Searrin's part prior to May 18, 1893; that instead of there being the large amount of uncollected matters supposed to exist July 17, 1893, there was only a very small amount; that instead of $1,160.30 of such matters at that date to be accounted for, there was only $322.60, excluding the worthless account of $283.87, of which $278.74 was for lighting service during the preceding month, leaving only about $50 of past-due bills and the worthless account of $283.87 which could legitimately have appeared in the account of $1,160.30; that Mr. Searrin acknowledged his defalcations and settled the same

to the amount of $1,733.26 by giving his note with security; and that the books kept by him showed the statements used upon the trial to be false. The facts of the situation so found to exist were set out in great detail, accompanied by Mr. Searrin's books, and by statements, making a strong case, and were presented to the court on the motion. If the facts were as stated in the motion papers, and competent proof thereof upon a retrial of the matter were produced, upon no possibility, it would seem, could the conclusion be reached that the parties charged, fraudulently or otherwise, appropriated any of the receivership money. Counsel for the respondents reply to this, relying, as on the trial, upon the unsworn statements of Mr. Searrin, which were the very matters which the new evidence was claimed would show to be false. Counsel's argument does not seem to meet the situation. Upon just what ground the learned trial court denied the rehearing as to this matter does not appear. With the strong presentation made, and the undisputed fact that the continuance was not asked for to enable appellants to make the investigation at Brookville before the trial closed, because the court gave assurance that the evidence was insufficient to establish any fraudulent appropriation of money, it seems that nothing but laches after the findings were filed could have justified denying the motion. It was addressed to the sound discretion of the court, it is true, and it takes a strong case to warrant this court in holding that judicial discretion has been abused. However, with the elements of assurance to counsel from the bench, their relying thereon, and reasonably, too, and a finding entirely inconsistent therewith, it would be a very grave question whether we could allow the order denying the motion to stand if it were material to the rights of the parties. Though it is not, and for that reason the matter will not be passed upon further, the situation is such that we feel called upon to say the foregoing in respect to it, and to suggest as a rule, that in the trial of an action, the evidence being closed as to

a material matter brought in by amendment on the trial, under circumstances rendering the adverse party, upon hearing the evidence in support of it, entitled to a continuance if desired, if the trial court gives an opinion that such new matter is wholly or in a material part unproved, and such adverse party relies thereon, submitting his defense without obtaining time to make investigation and bring before the court evidence which he otherwise would, and thereafter a conclusion is reached entirely contrary to such opinion, the case should be reopened as to such matter upon seasonable application being made therefor, with a reasonable showing that evidence successfully defending against such new matter can be produced upon a rehearing.

c. The substance of the findings as to this will be found in subdivisions 149 to 156, inclusive, of the statement. The facts, as we understand the evidence, are these:

May 15, 1893, Rust, *Thompson,* and *Gilbert* indorsed a note of $3,500 for the electric company, taking as security accounts receivable, matured or to mature, aggregating $3,900, one being against the Consolidated Engineering Company of St. Louis, Missouri, for $1,550. Soon after the receivership commenced the Knapp Electrical Company at St. Louis garnished this account. The receiver, acting by his attorney Mr. Frawley, caused the holders of the collateral to enter an appearance, because Mr. Rust, as a foreign receiver, could not well obtain recognition in the Missouri court. Such holders did not move in the matter except as requested by the receiver, as stated, and only to the extent of signing the necessary intervention papers. The whole matter was attended to by the receiver's attorney at his request. The garnishee proceedings were conducted in Missouri under the direction of R. G. Dun & Co. for the receiver, and were successful. At the termination of the garnishee suit, either directly or through Mr. Frawley, R. G. Dun & Co. caused an action to be brought against the engineering company to recover upon

the account in the names of the holders thereof as collateral. $944.76 was collected, which was remitted to the receiver less $77.80 charges, and the amount was later, upon the order of the court, paid to the owners of the collateral according to their respective interests, the petition therefor not containing information upon its face of the fact that the receiver had incurred expense to the amount of $155.75 in making the collection, $10.25 having been paid early in 1893 for the services of an electrician, $20 to Joseph Singleton as attorney's fees, and $125 to R. G. Dun & Co., which expenses were charged by the receiver to such holders. By authority of the court, under the order of June 2, 1897, heretofore several times referred to, the apparent asset was charged off to expense or loss and gain account.

On these facts the appeal is ruled in favor of appellants upon principles already sufficiently discussed. The trial court's decision, so far as not against the evidence, went upon the mistaken idea that it is not only improper but fraudulent for a receiver to take upon himself the burden of enforcing accounts belonging to the trust, subject to the right of collateral holders, if he has no good reason to believe that the collateral will yield a surplus over the principal debt. The disbursements were ordinary receivership expenses which the receiver might, under the circumstances of the case, safely have incurred without previous authority of the court. Certainly, he should not be charged with fraud in the matter.

Some of the findings seem so radically wrong that they should not be passed without special attention. The finding should not, it seems, have been made, carrying the impression that the collateral to the $3,500 note was $1,550 instead of $3,900. We do not perceive why it was found, in effect, that Mr. Frawley acted in the matter as the employed attorney of *Thompson* and *Gilbert,* since the evidence is undisputed to the contrary by both of them, and by Mr. Frawley. The mere fact that they were the interveners, in view of the

reasonable explanation made by Mr. Frawley, and we should say even without explanation, did not warrant regarding as false the fair and positive testimony of three witnesses. Neither do we understand why the finding was made that Mr. Frawley charged $430 for his services in the matter, and was paid out of the general assets in the hands of the receiver, when the evidence is undisputed that while he made such charges he never presented the same to the court, nor intended to, nor was paid by the receiver any specific sum on account of services in such matter, but that his compensation for his entire services for the receiver, upon his application to the court therefor, was settled without regard to any specific charges and on a *per diem* basis, proof being made of the number of days occupied in all the services rendered and the reasonable value per day of such services. There are other findings of this kind in what we have passed over, which have not been mentioned. We will say now that they seem to be unsupported.

d. The substance of the finding as to this is at No. 190 in the statement. The evidence is to the effect that, Rust, *Thompson,* and *Gilbert* being the holders of $3,900 of collateral, consisting of contract liabilities, assigned to them by the electric company as regards the $3,500 note before mentioned,—one of such liabilities being the Cassadaga Free Association contract for $1,200,—Rust, as receiver, expended a sum of money completing the contract so as to render the $1,200 collectible, prior to July 1, 1893. The finding is to the effect that the amount so expended was $51.20. Counsel for appellants claim the amount was $30.10. Which is right is immaterial. It was ordinary receivership expense, governed by the principles before stated. However, we will say in passing that we must agree with appellants' counsel that, since the expenditure was made a few days after the receiver was appointed, and the total of the collateral was more than the principal debt; and, as appears, none of the collateral

matters had yet been contested, nor was there any question as to the responsibility of the parties, the finding cannot be approved. Nor does any warrant appear for the decision that when the expenditure was made the receiver, *Thompson,* and *Gilbert* knew that nothing would come out of the collateral for the trust fund. Nor do we agree with the court that *Thompson* and *Gilbert* were in any way parties to the expenditure.

e. What we discover in the court's findings, upon which a fraudulent appropriation of $127.30 is based, is sufficiently indicated in No. 174 of our statement. Upon the evidence the matter involved seems to be very simple. The parties charged with liability were indorsers on notes of the electric company to the amount of $3,169.73. They held collateral duly assigned to them by such company to the amount of $3,642.50. In the early part of the receivership the receiver incurred indebtedness which he paid to the amount stated, to a collection agency and foreign attorneys for services in attempting to collect such collateral, with partial success. There is no claim but that, if it be proper under any circumstances for a receiver to use trust funds not expecting the collateral will more than pay the principal debt, it was proper in this case. The first court that passed upon the matter viewed the law rightly, and doubtless understandingly, as what has heretofore been said indicates. We might pass this matter without saying more, but it seems best as we proceed to make a brief detail reference to the more significant of the findings excepted to.

We find the conclusion that the money was corruptly expended, coupled with a decision that the evidence showed two badges of fraud: first, that it was known that nothing would be added to the trust fund from the collateral; second, that the receiver's attorney acted in the matter for the holders of the collateral, charging the receiver $214.90 and obtaining pay thereof from the trust fund. There may be some evi-

dence that there were indications that the collateral would not more than pay out the principal debt when the expenditures were made, but not that it was so poor as to indicate that the receiver acted wrongfully, much less fraudulently. On the other point we find no evidence to support the finding, but conclusive evidence the other way. The evidence is positive and satisfactory that whatever Mr. Frawley did in looking after the collateral was done under his employment for the receiver, and that he made no specific charge therefor which was presented to the court, or on the basis of which he received or expected to receive pay. What was said in the previous matter of the kind applies to this.

f. For the facts as found by the court on this we refer to Nos. 193 and 194 of our statement. The court's findings appear to be fatally misleading. The receiver is charged therein with having fraudulently expended $369.72 for the purpose of collecting collateral in the hands of *Thompson,* Rust, and *Gilbert,* knowing that nothing would come therefrom for the trust fund, and that *Thompson* and *Gilbert* were guilty participants because they consented thereto. The truth of the matter seems to be this: Prior to the receivership the electric company had large dealings with Caspari, Whittaker & Co. in disposing of its manufactured products. Business relations with such company were continued by the receiver in aid of disposing of trust property and collecting money due on previous transactions, the liability therefor having been assigned as collateral. When the receiver was appointed this situation existed: The Caspari Company was indebted to the electric company on account for $1,550. Part, as indicated before, with other matters aggregating $3,642.50, was hypothecated to *Thompson,* Rust, and *Gilbert* to secure their indorsements upon the electric company's notes to the amount of $3,169.73. There was a considerable amount of machinery in the possession of the Caspari Company on consignment, some of which was shipped shortly before the appoint-

ment of the receiver and formed the consideration for the liability assigned as aforesaid. When such machinery came to the Caspari Company in the regular course of business, it paid the freight and drew back therefor, the same amounting to $437.87. The receiver treated that as a matter which should come out of receipts for the machinery, and made his charges accordingly. The freight was a lien upon the machinery, which belonged to the receiver subject to the rights of the consignee and of the holders of the collateral. When the receiver paid the freight bill he expected the same to be refunded out of the sales of the machinery. That occurred, except $36.92, which was allowed as a refund by Mr. Rust on a claim made by the Caspari Company, and in the regular course of the exercise of business judgment. In the foreign jurisdiction the machinery in the possession of the Caspari Company, owned by the receiver, and the indebtedness of the Caspari Company, were attached in an action for the collection of a claim against the electric company. In the due exercise of judgment on the part of the receiver, to obtain a release of the attached property, $200.75 was expended. There were storage and insurance charges by the Caspari Company on the property of the electric company, which were a lien thereon, to the amount of $123, which the receiver paid. Other small matters were paid by the receiver, making the total expenditures the $369.67 in question. None of the payments were made by the passing of money from the receiver's hands to the Caspari Company. The various matters were paid by the Caspari Company's retaining the same out of the money due the receiver or upon their indebtedness held as collateral. The collateral account does not seem to have been more than incidentally involved. We find nothing in the evidence connecting *Mr. Thompson* and *Mr. Gilbert* with the matter except that the indebtedness assigned to them was created in the manner aforesaid, and was involved with other matters which the Caspari Company

treated as inseparable. We can discover nothing in any of the transactions which legitimately subjects any of the parties concerned to criticism.

Appeal No. 6.

Appeal of *Fitch Gilbert.* This relates to a subject not mentioned in the summary of the findings of fact in our statement. The finding on the subject is to the effect that *Mr. Gilbert,* having in his hands, obtained out of collateral duly turned out to him by the electric company, a surplus over the debt secured by such collateral, of $84.50, applied the same upon a $710 note indorsed by him for the electric company and which he was obliged to pay, when he should have turned the same over to the receiver, the collateral not having been given to him to secure his liability upon such note. The only question involved on the evidence is whether *Mr. Gilbert* held the collateral to secure him against loss as to the $710 note as well as the indebtedness upon which the rest of the proceeds of the collateral were applied. There was no evidence on the question except that of *Mr. Gilbert.* He gave a detailed statement of all the transactions as to a long, involved matter, not very difficult to understand, however, upon a careful study thereof, the transaction in question being a part of it. The controversy was whether, when he indorsed the $710 note, he obtained as collateral in consideration thereof whatever surplus might come out of a Baker & Co. note of $1,500 which he held as collateral in respect to other matters. In answer to the interrogatory, "Now, you may state what security was given you at the time you indorsed this $710 note," he said: "Practically all the account of the National Electric & Development Company of San Francisco and a small balance of the C. H. Baker & Co. note of $1,500."

Gilbert's right to apply the money as he did was sub-

mitted to the court, as were most of the matters which have passed in review, and was approved. December 6, 1893, Mr. Rust filed his petition respecting this matter, stating that *Mr. Gilbert's* indorsement upon the $710 note was procured by the electric company upon the promise of the Baker note as security; that it was turned out to him accordingly; that the proceeds of such note, after satisfying primary liens thereon, the balance being $84.50, was, with the approval of the receiver, applied upon the $710 note, and the sanction of the court thereof was requested. Thereupon, by an order dated December 2, 1893, judicial approval was given. There is nothing in the record to impeach this showing. It follows, necessarily, that the finding and conclusion of the trial court in respect to the matter cannot stand.

Appeal No. 7.

Appeal of *John S. Owen.* The court's finding of fact as to this matter does not appear in our statement. It involves $129.52 excess on collateral turned out by the electric company to *Mr. Owen* over and above money sufficient to pay the indebtedness to secure which it was primarily assigned, and sufficient to pay some other matters, all of which are found to have been properly paid. This surplus, the court found, was free from any claim on the part of *Mr. Owen,* and should have been paid by him to the receiver, but instead of so doing he misappropriated it by applying the same on his unsecured claim against the electric company.

The details of the evidence on this subject need not be stated. Suffice it to say that the sole controversy was whether at the time *Mr. Owen* used the money there was an existing valid agreement entitling him to do so. No question of law was involved. The question was one of fact, and could not be resolved otherwise than in *Mr. Owen's* favor except upon the theory that his testimony in respect to the subject was

entirely unworthy of belief. We see nothing unreasonable in his evidence. It was positive, clear, and concise throughout. Holding the collateral, and being a large creditor, as he was, that he should have demanded as security the surplus of the note if any should come out of it, was most natural. It was what any business man of reasonable intelligence and prudence would have done under the circumstances. It was what any debtor, under the circumstances, if asked, would be expected to consent to. It seems that in setting aside *Mr. Owen's* evidence as false, the court overlooked the familiar rule that the undisputed reasonable evidence of one witness, though a party interested, should be given controlling weight in determining a question of fact. *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304.

The record shows that when *Mr. Owen* claimed a right to the money the receiver did not consent thereto. The situation was such that he was called upon to choose one of three courses of action: first, submit to *Mr. Owen's* position and take the chances of subsequent judicial sanction; second, try conclusions with *Mr. Owen* in an action and take such chances; or third, submit the matter to the court for advice in advance, with or without an expression of judgment in the matter, and follow whatever direction might be given. The latter and more prudent course was adopted. The petition fairly stated the facts as to *Owen's* claim, without any opinion as to the real right of the matter. It closed with this language: "Your petitioner doubts the propriety of litigating or contesting the claim of said *Owen* to said $129.55, and asks the court for directions as to the course that he shall pursue in the premises." An order was entered on such petition, in effect, that the money as applied by *Mr. Owen* should be deemed properly used. It must be obvious that in the face of that situation the conclusion made by the trial court that the money was wrongfully applied could not stand upon any other theory than that the whole administration of the trust

was so steeped in fraud that, regardless of direct testimony, however fair upon its face and however undisputed, and regardless of judicial sanction in the matter, everything done should be deemed wrong until clearly shown to be otherwise. We have not, up to this time, found anything in this case that will warrant a serious thought that there was any such corruption in the administration of justice, involving all concerned in it, from the head down, as that would indicate. We are constrained to say that, since the findings, passing in review, cannot be sustained consistently with the belief that even the judicial director of the receiver was not guilty of negligence in the highest degree.

Frequent reference is made on behalf of respondents to the fact that the advisory orders to which we have referred, and others of the same character, were granted *ex parte*. Of course, that has no significance upon any other theory than that the whole administration was so faulty that every act should be deemed bad not shown clearly to the contrary, where creditors were not given special opportunity to be present and protect their interests,—since the usual course in such matters is to make advisory orders in just the way those in question were made. No one familiar with such matters would, under ordinary conditions, expect that a receiver would obtain in advance judicial advice as to every detail of the business under his charge, or that proceedings to obtain advice should ordinarily be upon notice to creditors. A matter of this kind must necessarily proceed, so far as practicable, the same as any other business matter would be conducted. It involves in the main executive functions of a purely discretionary character, circumscribed, of course, to some extent, by rules, but allowing considerable freedom of action to the receiver without advice, and absolute immunity from liability when acting under judicial direction so within the realms of reason as to entitle him to protection if the judicial head would be so protected if competent to act in the

physical capacity. The receiver is the court, as near as it is practicable for the court to physically have a business matter in charge. He is a mere agent. In handling a large, complicated matter, he must ordinarily keep quite close to his principal, shaping his course in that regard as near as practicable after the manner of any other business agent. He commonly counsels with the court in respect to matters as a business agent would counsel with his principal, keeping such principal reasonably familiar with the affairs, and taking his suggestions in advance of action in many situations not deemed necessary to be made matters of record, but very necessary, in order to do justice, that the court should be able to call to mind upon the conduct of his receiver thereafter being called in question in respect thereto, and also to have in mind when called to deal with his receiver in respect to any matter dependent thereon in whole or in part. All that is necessary to an orderly, safe administration of a receivership trust like the one in question.

Everything depends upon the combined business judgment, legal knowledge, and judicial acumen of the judicial head in such matters. The element of business judgment is of the greatest importance, since there is little or no opportunity for redress in case of error in that field. The judge must necessarily depend to a great degree upon the ability of his receiver; but in the end every act is the act of the court. In this is seen what vast responsibilities, in receivership matters of which this is a type, rest upon the judicial administrator. If he excels as a business man, or has one for his agent who so excels, the results will ordinarily be of the best. If his business judgment is but limited and is not helped out by that of his receiver, however honestly everything may be administered, the end is likely to be disastrous. But whether it be of the best or the worst, within the uttermost limits of business discretion under all the circumstances, the conclusiveness is the same. It is the only way yet de-

vised by human wisdom for doing such things. Though results up to the high standard of the better class of privately managed business enterprises cannot be expected, the infirmity in that regard cannot be helped. It can best be guarded against by great care in the selection of receivers, and the judge keeping in close touch with them. But when the judicial director gives the use of the talents he possesses to the situation, his duty is fully performed regardless of consequences. Parties so circumstanced as to require judicial assistance of that character must take the agent provided in the due course of law. There is no way, as in private enterprises, of replacing such agent by another if the one first selected is not found satisfactory. In this may well be appreciated how careful the court sitting in review should be in condemning the judicial administrator or his agent as being inexcusably negligent or something worse. They often occupy very trying situations. They have at times to deal with a multitude of creditors so smarting under the sting of pecuniary loss as to bias them greatly in judging the actions of others. It is not to be wondered at that sometimes, after a receiver and his director have done the best they can with a wreck for which they were in no wise responsible—one that has so little of real substance in it, as demonstrated by the end—interested parties cannot comprehend how such a thing could be and will not excuse it, and the receiver and all concerned suffer in reputation, if not otherwise, for what they could not help. All this should admonish courts of review to step with caution in reviewing such administrations; should admonish judicial administrators to exert themselves to the very best of their ability to fully meet their great responsibilities, and, in case of inexcusable conduct, should hold them and their agents morally responsible where the law furnishes no remedy, and otherwise responsible to the extent of legal obligations. These generalizations are not intended as a criticism of the administrator of the trust in

question further than the points decided go. So far as we have gone, justice requires us to say it compares fairly with the general run of such administrations, considering all the circumstances, which have come under our notice. It is well to keep in mind in original jurisdictions, as we endeavor to do, that the policy of the law is toward holding judicial administrators and receivers to a more rigid rule of responsibility in these matters than formerly, as is well evidenced by the statutory removal of exemption from liability incident to the judicial office under some circumstances, as in sec. 2583, Stats. 1898. *Lefferts v. Calumet Co.* 21 Wis. 688. Further indication of that is found in *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N. W. 243, where the court, speaking by Mr. Justice DODGE, to the end that a higher standard might be set, said:

"Only in the wise discretion and firmness of the courts can there be found prevention or remedy for the abuse and disgrace of judicial conservation of estates from their enemies, only to permit their destruction by their salvors. If such abuses continue, the beneficent power of a court of equity to take to its sheltering arms a litigated estate while rights to it are being established will become a mockery, worse than the avoided perils as it is more effective."

The great truth, so forcibly and tersely uttered, might well be posted in every judicial presence in the land.

Appeal No. 8.

We have now arrived at a point in this great case where we are in view of the last act of the drama which was found by the trial court to have had its inception before the commencement of the *Barber* action, to have been born in iniquity, and to have progressed through all its stages of growth to the final consummation without any diversion from the original wrongful purpose. We have come to the point where the actors are to take their places for the final performance.

As we have progressed through over four years of history, seeking diligently for tangible evidence of fraud, from which, if at all, the alleged original fraudulent purpose was to be inferred, we have not found it. If we had started by looking through the mental coloring of an impression of wrongdoing caused by the history of things done prior to May 18, 1893, and journeyed in pursuit of evidence to dispel it, maybe things would have appeared differently. As we now take our bearings for the final view that is to end our investigation, we need not "refer to the point from which we started to determine where we now are," because we have not drifted from a direct course. The point of starting we have endeavored, with effect, it would seem, all the time to keep in sight. Only the ending was in obscurity. That is now so in evidence that it seems clear that it cannot be tied back to the alleged and found original fraudulent purpose. We have endeavored to consider carefully everything of importance upon which counsel rely and which we must presume greatly influenced the trial court in the conscientious disposition of this case,—we have no reason to doubt for an instant but that there was such disposition of it—and yet no substantial evidence of fraud has been seen. We may well refer to some of the more significant of such things which have not heretofore been specifically mentioned, lest it be thought something has been overlooked.

Probably the most significant of them is the circumstance that Mr. Hayden, prior to the commencement of the *Barber* action, had been for a long time the attorney and an officer of the insolvent, and that he severed his relations as such attorney just before the action was commenced and was then instrumental in placing the insolvent's business in the hands of a receiver, he being at the same time a creditor and acting for and interested with others who were likewise circumstanced, some of whom had from time to time obtained security for their claims, and many of whom were Mr. Hay-

den's business associates. Without some tangible evidence of fraud those situations have a perfectly innocent aspect under the circumstances. If Mr. Hayden was to commence the receivership action, it was, of course, proper that he should first sever his relations as attorney for the insolvent. Probably it were better had he retained such relations and let some other attorney commence the action; but there is little or nothing in that when we see that in the very nature of things no adversary element existed in a sense that the interests of the insolvent called for any opposition whatever to the receivership proceeding. There was no great impropriety, if any, in Mr. Hayden representing the plaintiff, expecting that the insolvent would admit the facts alleged which were relied upon to secure the sequestration, so long as there was no ulterior motive; though, as before indicated, it were better if some one else had performed the service. There was no question but that the electric company was an eminently proper subject for a receivership action. It was hopelessly insolvent, as all agree. The interests of all creditors and stockholders, and of others legitimately interested in the corporate assets, demanded judicial treatment of the kind administered. No time was required to diagnose the case to solve doubtful questions on that point. The voices of all, could they have been heard speaking legitimately, would have been in harmony for the creation of the trust. That the proceedings were speedy was most natural. They are usually so under similar circumstances, in order that an equitable levy may be accomplished before individual adverse efforts for preference, or efforts to institute sequestration proceedings in different jurisdictions, have unduly complicated the situation. Proceedings somewhat unseemly in such cases from one aspect, are not so from circumstances that often exist in view of the infirmity of judicial remedies to always secure without needless expense a single judicial control of the property of an insolvent corporation for the

benefit of its creditors. Mr. Hayden testified distinctly, and he is corroborated by all the circumstances, that he was active in commencing the *Barber* action for the sole purpose of putting the assets of the electric company in possession of the court before opportunity were given for the institution of numerous embarrassing actions, liable to be detrimental to the general interests of creditors.

Considerable significance is given to the fact that Mr. Hayden not only commenced the litigation, but that after charging *Mr. Barber,* his employer, the sum of $200 for services, the charge was, in September thereafter, transferred upon Mr. Hayden's books to the account of R. E. Rust, receiver. That circumstance is urged upon our attention with great force by the learned counsel for the respondent, and we must assume that it was urged with like force upon the learned trial court, from the fact that, although it has no significance whatever when the case is viewed in its proper aspect, it found a prominent place in the court's findings. Mr. Hayden testified, in effect, that he transferred the charge of $200 from being against *Barber* to an account against the receiver, because of his judgment in regard to the propriety of such charge being made a receivership expense. That the reasonable expense incurred by the attorney in the commencement of a receivership action, such action being commenced in good faith in the interests of all the creditors, is a proper charge upon the trust fund, there can be no doubt. It is commonly presented as such and is allowed or disallowed according to the circumstances, the former being the general rule where the circumstances indicate clearly that the proceedings were judiciously commenced, with no ulterior purpose in view. On this subject, in one of our late text-book authorities it is said:

"In the control of the trust property a court of equity will recognize every substantial equity, and when one party, for the benefit of himself and all other parties interested in the

property of a corporation, begins an action or proceeding for the preservation or administration of the property, and for that purpose a receiver is appointed, equity would require that such party should be reimbursed from the trust property for counsel fees and expenses incurred in procuring the appointment of such receiver." Gluck & Becker, Receivers, 354.

Such text, for support, refers to *Central R. & B. Co. v. Pettus,* 113 U. S. 116, 5 Sup. Ct. 387, and *Davis v. Bay State League,* 158 Mass. 434, 33 N. E. 591. True, as the author indicates, the authorities are not all one way on this question. But, having the support of the federal supreme court, the presentation of such a charge for allowance in a receivership proceeding could hardly be deemed wrongful, much less an indication of fraud. In the federal case cited, Mr. Justice HARLAN at great length discussed the subject, in the course of which he said:

"When creditors filed their claims they had notice, by the bill, that the suit was brought, not exclusively for the benefit of the complainants therein, but equally for those of the same class who should come in and contribute to the expense of the litigation. Those expenses necessarily included reasonable counsel fees, which, upon every ground of justice, should be estimated with reference as well to the claims of the complainants who undertook to protect the rights of all the unsecured creditors, as of the claims of those who accepted the fruits of the labors of complainants and their solicitors. We are of opinion that the appellees are entitled to reasonable compensation for their professional services in establishing a lien in behalf of the unsecured creditors."

Though the circumstances of that case are different from those of this one, the principle involved there is identical with the one here. We have not been able to discover any ulterior purpose in the commencement of the *Barber* action, or in any of the proceedings therein. The fact that there were secured creditors, and that many of them were clients of Mr. Hayden, and some of them his business associates, is not significant, since it appears that the rights of general

creditors were not trespassed upon by the holders of such securities, and that the secured creditors had equal rights with others in the trust to be created. It may be easily seen that the commencement of the action was more beneficial to the unsecured than the secured creditors. The chief interests requiring protection were those of the general creditors, to the end that their rights to equal liens upon the corporate assets might be judicially determined and enforced. Mr. Hayden's position as to one class was, in that light, in no wise hostile to the other. The fact that an officer of the corporation and a creditor was appointed receiver does not indicate a wrongful purpose. The fact that one is a creditor of an insolvent corporation rather tends to suggest the propriety of preference being given him in the selection of the receiver than otherwise. *State ex rel. Fourth Nat. Bank v. Johnson,* 105 Wis. 164, 183, 83 N. W. 320; *Frink v. Buss,* 45 N. H. 325; Burrill, Assignments, § 57, and cases cited.

The fact that the receiver and a much-interested creditor, *Mr. Owen,* were brothers-in-law and business associates, having desks side by side in the same office, which is urged upon our attention as important, is hardly worthy of attention in view of all the circumstances and the law applicable thereto heretofore discussed. It would be exceedingly embarrassing to do business if a person of good standing, because of having ordinary business relations with a class to which some of his wife's relations belong, must be regarded as so liable to unduly favor them in performing a duty where they and others are concerned, that his actions in the matter should be considered as tainted with fraud till rebutted by satisfactory evidence.

Many other circumstances are disclosed by the record and forcibly presented by respondents' counsel, which we may well presume from the whole record, in connection with counsel's attitude, materially influenced the court, but which do not, when mentioned either by themselves or in connection

with anything else appearing, have any material bearing. Perhaps we should not pass from this field without mentioning, in connection with what has been said, the circumstance referred to by counsel, and which was given a place in the findings of the court not only as indicating fraud but also professional impropriety,—that the attorney or counsel for the receiver performed the professional service of assisting in making the formal proof for some of the secured creditors, to be filed in the receivership proceeding. There being no contest as to the claim, merely assisting the creditor by preparing his written proof for him would seem to have no significance. Of course, the assumption indulged in, in embodying such circumstances in the finding, that the position of the secured creditors was necessarily hostile to that of the unsecured creditors and therefore that it was improper from a professional standpoint for the attorney for the receiver to act for the secured creditor in such a matter to the extent indicated, is entirely unwarranted.

Since it seems that nothing hereafter to be reviewed can change the aspect of the case as to the major fraudulent agreement, alleged and found to have been made, and to have from before the *Barber* action to the end of the receivership proceeding ruled it, it is thought best now to decide that we find no such original fraud, and that the finding of the court in that respect, in No. 113 of our statement, cannot be sustained.

We will now take up the merits of this appeal. The trial court's view, in the main, will be found in our statement, 113 to 128 inclusive, 176 to 178 inclusive, and 195 to 239 inclusive of the facts, and 19 to 22 inclusive of the law. But in order to thoroughly appreciate such view, one should, perhaps, examine the entire findings as contained in the main in our statement. The material matters to which this opinion must relate will be deemed sufficiently set forth here by our reference to such statement, except as we may inci-

dentally restate them. Much that is covered by the findings, a great part of which was omitted from such statement because not necessary to be considered, and much already considered, leads up to the conclusion that the determination in the court's finding No. 113, must now be rejected. That includes most of the circumstances leading to the court's conclusion that Mr. Frawley, soon after the *Barber* action was commenced, became a party to the alleged original wrongful agreement. That element in the trial court's decision, necessarily, is eliminated from the case with our disapproval of the findings upon which it is based.

A second fraudulent agreement is found to have been made. In finding 201 it is held that early in the receivership it was agreed between the receiver, Mr. Frawley, and Mr. Hayden, to so manage the trust that nothing would be left for general creditors, and it is said that the services of Mr. Frawley were rendered with that end in view, and that in consummation thereof, at the close, such proceedings were taken as to allowances to be made to the receiver for himself, his attorney, and counsel, that all the trust fund was divided between the three parties, such fund amounting to somewhat less than $13,184.11, and that, there not being enough to go around and satisfy all their demands, the deficiency was prorated according to the amounts of the judicial allowances. This indictment is quite as severe as the one we have disposed of, and it is in great part dependent upon the misapprehensions of law and fact upon which the original finding of fraud was predicated. If the learned trial court had viewed the case from the standpoint we have reached, it is very probable that this other supposed fraudulent agreement would not have appeared to the judicial mind. There is no direct evidence of it. In determining whether there is any circumstantial evidence thereof, it seems best to treat the matter by the inductive rather than the deductive process of reasoning.

It is true, as found, that near the close of the term of office of the judge who supervised the receivership proceeding for over four years, he passed the receiver's account and allowed him for his services and expenses for attorney and counsel a sum exceeding the total amount of the trust fund in hand, leaving nothing for general creditors, and that the deficiency of money to pay the allowances was prorated. But the right or wrong of that is determinable only by passing upon assignments of error as to facts found regarding occurrences which took place, if at all, before the proceedings for the allowance of the receiver's final account. What is left to be considered appertains particularly to what occurred during the period commencing with the preparation for the accounting, but must be viewed largely in the light of what occurred theretofore.

The findings touching this subject are considered in appeals Nos. 1 and 2 as to the Asheville matter, in appeal No. 3 as to the Bucyrus matter, and in appeal No. 5 at "a" and "f" as to the Brookville matter. We need not refer to them now more than incidentally. Since the unfavorable inferences based thereon must fall, with them must go one that the receiver managed his trust for the sole benefit of himself, his attorney, his counsel, and certain business associates. Finding 202, to the effect that that much of Mr. Frawley's services was for the special benefit of the holders of hypothecations, though he charged the receiver therefor and was paid out of the general assets, and that he charged upon his books exorbitantly and dishonestly for services rendered the receiver and holders of hypothecations, obtaining his pay from the trust fund,—we have not been able to find any evidence to sustain. If we read the evidence aright the truth of the matter has been before stated; but it is so very important to this appeal that it will bear restatement.

It seems to us that the evidence is undisputed that Mr. Frawley's services, from first to last, were for the receiver;

that the book charges mentioned in the finding refer solely to services rendered for the receiver; that they were made as memoranda of the transactions, not as representing the compensation to be demanded for the particular services mentioned; that it was not designed to ask for compensation upon the basis of such charges, nor was that done. The evidence is without dispute that none of such charges were presented to the court which made the allowance on account of Mr. Frawley's services, nor were known of by it. The error as to this is connected with another in that the court found that Mr. Frawley's book charges aggregated $8,818.31 and that he was paid a lump sum in addition thereto of $3,092.42. It is difficult to see how a finding could have been wider of the mark than that and yet have some shadow of connection with the facts. We feel constrained to say this that nothing may be left of so erroneous a record. Probably the extraordinary finding comes of the court's having adopted, without careful study, a finding suggested by counsel, conscientiously prepared, doubtless. The practice which sanctions that, when the court, especially in a complicated case, does not make careful study of the suggested findings in all their bearings before making them official, is quite liable to lead to bad results. It is a practice which, in the judgment of the writer of this opinion, it would be well to discontinue by judicial action if that can be done, and if not, by legislative aid. The profession and the judiciary, and the parties litigant as well, would be greatly benefited by such a reform. Experience shows that counsel, the most able, honorable, and conscientious—and to the learned counsel for respondents we may well give a place in that class—after the close of a hotly contested case, are not in the frame of mind, ordinarily, best suited to drafting the findings which must express the judgment of the court. That is no criticism. It is only an acknowledgment of the natural infirmities of the most perfect of us. All are affected, regardless of ability or purity; the

difference is in degree. The making of the findings is purely a judicial function. Sec. 2863, Stats. 1898. Aside from the custom which sanctions it, it would seem to be just as proper for the judges of this court to receive from contending counsel suggestive samples of the opinion and judgment to be rendered, with the expectation that one will be chosen, either as written or with changes to correspond to the views of the judge, and then placed on file as voicing the judgment of this court, as for a like practice to obtain at the circuit court. It is hoped that nothing said here will be regarded as a criticism upon court or counsel. Both are distinguished, able, and honest. It is the practice that is criticised,—a practice for which no one connected with this case is responsible. To that practice, it seems, many of the mistakes in the findings before us are attributable. Things look far different to counsel than to court, as is evidenced by the fact that sometimes counsel will conscientiously claim here that the evidence is all one way in support of their position, when from the judicial standpoint it is largely or wholly opposed thereto.

True, the court allowed to the receiver a sum for expenses on account of Mr. Frawley's services, $3,092.42 in excess of the charges which by the evidence upon this trial were found upon Mr. Frawley's books. But, as was said in another part of this opinion, the allowance was made on the basis of one entire charge for all the time devoted by Mr. Frawley to the receivership business, from May 23, 1893, till the close, December 30, 1897, the rate being $50 per day for time actually spent. There was really no arbitrary allowance of a lump sum of $3,092.42 or any other lump sum. However, if the court had seen fit to make an allowance without regard to specific charges or a *per diem* basis, it would have accorded with the practice usually adopted in such matters, as the cases cited by counsel for appellants, and others referred to, and more that might be referred to, sufficiently show. *Greeley v*

Provident S. Bank, 103 Mo. 212, 15 S. W. 429; *Bound v. S. C. R. Co.* 43 Fed. 404; *Boston S. D. & T. Co. v. Chamberlain,* 66 Fed. 847; *Maxwell v. Wilmington Dental Mfg. Co.* 82 Fed. 214; *Stuart v. Boulware,* 133 U. S. 78, 10 Sup. Ct. 242; *Harrison v. Perea,* 168 U. S. 311, 18 Sup. Ct. 129; *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250; *Remington v. E. R. Co.* 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

From evidence that it had been customary for Mr. Hayden during his professional life to enter from day to day charges for legal services performed by him, and that as regards the receiver he had charged items amounting to $479.74, including $50 for expenses and the $200 originally charged against *Mr. Barber* as aforesaid, the court found that he rendered no services for the receiver other than the specific matters so charged, and, we assume, less the $200. We confess inability to find the evidence in support of that conclusion. Counsel for respondents do not satisfactorily point to any. It seems based, in the main if not wholly, on an inference that since it was Mr. Hayden's custom to make charges for specific professional labor, the reasonable probabilities were that he did so in every instance. That is, as we understand it, a custom being established as regards one's private business, it must be presumed to be universal. We do not understand there is any such rule of evidence. A custom in regard to a particular matter is controlling in the absence of evidence to the contrary (Jones, Ev. § 54), and in doubtful cases. But why should that be applied to the matter under consideration? Is the truth in respect to the matter doubtful? The learned trial court no doubt so thought. Starting with the finding of a general fraudulent purpose and finding later a specific fraudulent agreement,—of course every question was necessarily doubtful that depended upon oral evidence of the guilty parties. It is more than probable—it is pretty certain—that the finding in question would not have been made, with the elements out of the case which we must regard, from

what has been said, to be absent. But the great difficulty with the conclusion of the court is that the supposed principal fact from which it was inferred is not established by the evidence. In this instance it seems best to quote the finding and the most salient parts of the evidence supposed to have warranted it. This is the finding:

"The defendant H. H. Hayden has been in the continuous practice of the law in the city of Eau Claire since the year 1872. From the time of the commencement of said receivership and for many years prior to May 23, 1893, it was the custom and rule of said Hayden in the conduct of his business to keep an accurate set of books of account, in which he entered in detail an itemized statement of all charges made by him or by any one in his employ for legal services as they were rendered from day to day or within a short time after the rendition of such services."

The evidence, in the main, was this: Mr. Hayden's books were offered in evidence. They showed specific charges in the receivership matter as follows:

May 31, 1893.	Day's services	$50 00
June 26.	Examination of Mulland Co. matter	5 00
June 23.	Advice Ft. Worth contracts	5 00
June 30.	To service on Bucyrus contract	5 00
July 26.	To services on Winnipeg, etc., matters	25 00
Aug. 18.	To proof of claim before U. S. court commissioner	5 00
Aug. 28.	To expenses at Milwaukee on reappointing receiver	15 00
Sept. 4.	To services on order to continue time of sale	50 00
Sept. 19.	To appointing Rust receiver in second action	200 00
Sept. 22.	Drawing papers for settlement with Commercial Electric Co.	15 00
Oct. 19.	Services at Detroit, etc	49 80
May 24.	Services by Walmsley, etc	10 00

These, with some other charges for expenses, aggregating $50, are all that appeared. There was an interim of about two years, being from May 3, 1893, to May 24, 1895, in which there were no charges at all. No charges of any moment appeared for services such as would ordinarily be rendered by a general counsel. Mr. Hayden testified as follows:

"I have been in the habit for many years of keeping accounts in my business. In most cases I put down charges for each day, but not as matters occur,—sometimes days

afterwards. That is not true as to all matters. I tried to have that practice followed in my office, but being unable to do so abandoned it. I tried to get all on the books done by my clerks, because they were interested in the matters. Charges went on my books as to most clients, but not all. I have been attorney or counsel in other receivership cases. In the insurance company receivership I hardly made a charge. In most matters of accounts I have endeavored to charge on my books for services shortly after the same were rendered. The reason why in this case I did not charge on my books for services rendered is that I expected my compensation would be fixed by the court at the end of the receivership. Nearly all the charges in this matter on my books are for services rendered by Mr. Miner. I think I made no entry whatever in this matter from beginning to end in regard to any of my consultations with Mr. Frawley, the attorney for the receiver, either alone or with the receiver. I think I made a few entries where the receiver himself personally called upon me to do some particular piece of work which belonged to the attorney, and also an entry or two where other persons were interested in the particular work which I did. I did not think, because I was looking forward to the settlement of my compensation by the court, that it would be proper to keep an accurate account to aid him. I thought the court well informed as to my services and their value. I did not think an itemized account from the beginning to the end would be required. I think the manner of dealing with such matters is different than with an ordinary client; that the court usually allows an annual compensation, or averages it that way. That has been my experience. I have been familiar with cases where that was the practice. I do not recall to mind instances. I did not have, when my charges were passed upon, and never had, any memorandum from which to determine the time spent by me, except the charges upon my books. Never had any such memorandum. Generally my matters are charged. I did not itemize my account for the receiver of the insurance company, nor for Mr. Smith, the receiver of a crockery company. I expect in such matters an allowance will be made by the court regardless of charges, the consultations are so common and so petty. I did in this matter about all of the work of counselling and

advising. I did the work of counsel and Mr. Frawley that of attorney. I did some little work on the hypothecations at the request of the receiver, and was paid therefor. I did a large amount for the holders of the hypothecations, and they paid me therefor. I was employed as counsel for the receiver immediately upon his appointment. I continued in his employ in that capacity till the end of the administration. My services were mostly of an advisory character for the receiver and the attorney. When I did work for the holders of hypothecations there was no question as to their rights as regards general creditors. I have had a good and large practice since 1872. My usual charge per day for services is $50. The reasons why I did not charge in this matter for all services, are, first, the nature of the employment being exclusively matters of advice, rendering it difficult to make specific charges; second, my system of keeping my accounts was somewhat unsettled because my partner died about when the service commenced, and they drifted along without charges, except now and then a charge at the commencement of the business. My services for the receiver occupied 100 days. There were many matters attended to of an embarrassing nature. There were a great many complications. The business was scattered all over the United States. I have performed no services for the holders of hypothecations where their interests conflicted with the receiver's. I have not made any attempt to itemize my services for the receiver. I could not so present my claim. I did not bring suits, but all matters during the receivership where there was litigation were brought to me for advice. The reasonable value of my services is $50 per day, and $5,000 in the entirety."

There was much more evidence, but none to change the effect of the foregoing. Mr. Hayden's books showed that in many instances he did keep, as testified, carefully itemized accounts. His evidence was fully corroborated by Mr. Frawley's and other evidence, as to his having in fact acted as counsel in the receivership matter through the whole administration. Comment thereon seems unnecessary. It does not appear to us to bear out the finding. On the contrary, the finding seems to be clearly against the preponderance thereof,

not only when we look at the evidence by itself, but in connection with all the other facts and circumstances in the case. On the whole the evidence shows that Mr. Hayden did not have any custom as to keeping accounts upon his books in an itemized form where his services were of long duration and strictly of an advisory character. In his professional experience in receivership matters, it seems he had not attempted to make specific charges. His judgment was that it was hardly possible to keep an account that way for services rendered as general counsel, and that it was not required. That is reasonable. It is according, we should say, to common experience among professional men where the service extends over a large period of time. We are safe in saying that a general counsel in a large business matter rarely makes charges for advice as rendered from day to day, at least in a receivership matter where the compensation is, as a rule, to be allowed by the court to the receiver, not to the counsel, at the closing-up of the trust, and is to be fixed, not with regard to charges, but with regard to services actually performed, the reasonable necessity therefor, and the value thereof to the trust and other considerations. It looks as if the learned trial court made the finding as to this matter upon an entirely wrong basis. It seems to have been supposed that a general counsel for a receiver should keep an itemized account of every instance where he acts,—something out of reason and experience. We find no evidence in the books that any such practice was ever supposed to be necessary, and we find no instance even where it was followed. The finding as to Mr. Hayden's services and the value thereof cannot be regarded as even an aid to the determination of what was right. The same is true of the finding in regard to the value of the services rendered by Mr. Frawley. There is no need of prolonging this opinion to go further into matters of detail in respect to this subject. The findings as to Mr. Frawley's services are based on the false assumption

that what he did in aid of collecting hypothecated matters was done for the holders of the hypothecations under the cloak of his position as attorney for the receiver, and that was based on the false assumption that the receiver had no interest whatever in such hypothecations which even the order of his court would protect him in conserving, and on the false assumption that the holders of the collateral were necessarily in a capacity hostile to general creditors; and on other false assumptions of fact and of law to which we have referred, and others which we will not review, since it would add nothing in effect to what has been said; and further by entirely ignoring the undisputed oral evidence in the case that all the services rendered in regard to matters which had been hypothecated were rendered at the request of the receiver. The court found that under ordinary conditions the services rendered by Mr. Hayden would have been worth the amount charged on his books, those of the receiver $4,000, and those of Mr. Frawley $3,000; but that they were not entitled to anything on account of their having been guilty of dishonest conduct to the great prejudice of the general creditors, for which they should be compelled to restore all paid them, aggregating $23,523.86, with interest. If the underlying conclusions as to that were warranted, the ultimate conclusions would be just; but they were found by such misconceptions of the law and the evidence that they are not only wrong, but so radically wrong as not to aid us in determining what is right.

We must now consider the transaction of settling the receiver's account and the steps leading thereto. That includes the filing of the account in early June, 1897, and the proceedings thereon till the final order was entered. To understand aright what occurred during the last few days of the receivership, acts must be viewed in the light of the situation in which all the characters concerned were placed. We are now able to do that, having discovered that the findings

which would otherwise interfere therewith are unsupported by the evidence and were made otherwise through misconceptions of the law. We must assume, until it otherwise appears by some tangible evidence, that there were concerned, in settling the account, an upright referee, receiver, attorney, counsel, and court. We must take judicial notice that immediately after the April election of 1897 it was known that the receivership would have to be closed by the end of the year, or the matter of settling the long, complicated account would necessarily go before a judge entirely unfamiliar therewith. We must place ourselves in the position of the parties charged at this time, as near as we can, and look forward. To do otherwise would be unjust. It is entirely consistent with an honest administration of the trust that all should have deemed themselves bound to close the matter up before the time arrived for the judge who was familiar with it to pass out of office. He had been the real administrator. Others had been merely his agents. Everything was ready for the closing except a few minor matters. The laborious task was yet to be performed of passing upon the vast account and adjusting the compensation of the officers of the court for the time spent by them during a period of four years and a half. The relations, from a business standpoint, between the judicial agents and the presiding judge, were much the same as between a private principal and his agents, with this significant feature added: there was an army of parties to the litigation very likely to assume an attitude of hostility to the court's instrumentalities, upon facing the situation then apparent, that there would be so little for them in any event that it would hardly pay the expenses of distribution. No one could ever be expected to devote the labor to the matter necessary to become equally fitted to deal justly in respect thereto, with the judge who had been in touch with it from the beginning. The interests of the creditors were as much at stake as those of the receiver and his attorney

and counselor. The labor of the latter to be compensated for was large, and likely, under the circumstances, to require a most thorough investigation. While claims of the former were in the aggregate large, the amount obtainable by each was so trifling that except in case of a *prima facie* showing, a pretty strong one, of wrongdoing, confidence in the court and its officers would ordinarily deter dissatisfied creditors from making complaint. The administration had been kept from the start exceptionally under the eye of the judge. The period covered, as indicated, was over four years. During that time no report had been filed in the court, and none had been required. In passing upon the account, necessarily, the entire administration, from the beginning, was to be to some extent investigated. Nothing approaching the proceeding in magnitude and complications, probably, had ever before occurred in that jurisdiction or anywhere else, where the parties chiefly concerned had carried the responsibility. Nearly $500,000 in nominal value of assets had been conserved; about $100,000 in money had been obtained therefrom aside from that which legitimately went to preferred creditors. Nearly 250 administrative orders had been granted on as many presentations by petition or otherwise to the court. The amount of the claims filed and considered represented an indebtedness in the aggregate of hundreds of thousands of dollars. The number of creditors was very large. The consideration and adjustment of the claims involved innumerable disputes, many of which imperfectly or not at all appeared upon the record. There had been many actions tried in home and foreign jurisdictions, the latter embarrassed by the difficulties commonly experienced when a receiver goes out of his state. No reason whatever existed for this vast subject to go before a judicial officer unacquainted therewith, for final adjustment. The attorney and counsel for the receiver owed it to him, themselves, and the court, to use their best efforts not to allow the term of office of the presid-

ing judge to end without his leaving upon the records of the court the judgment of the law in respect to such matter. The receiver, as regards the court, his legal assistants, and the army of creditors whose interests he had, as the court's agent, in personal charge, and as regards himself, had a like duty. Above all the sitting judge, by every consideration of official duty, owed it to his receiver and the creditors to open the doors of his court as wide as due process of law would permit rather than to let this mass of things be unsettled when he should doff his robes of office at noon on the first Monday of January, 1898. Failure of the attorney and counsel to use the greatest diligence practicable to bring this matter to a termination before that time, would render them unworthy of that trust and confidence which is to the professional man his greatest support. Failure on the part of the presiding officer of the court would be a judicial outrage. He would carry into private life a burden of duty unperformed which no right-thinking man would assume. We feel confident that this is not an overdrawn picture. More likely it is incomplete. The actors in the matter in the spring of 1897 could see it well perspectively. We that have now to deal with it can see the same better, perhaps, retrospectively, since, notwithstanding the trust was settled in a most orderly manner until the closing scene was reached, dissatisfaction by the army of disappointed creditors, honestly thinking, no doubt, they had been greatly wronged, their complaints being necessarily dealt with by judicial agencies without the aid of personal touch with the matters as they occurred, resulted, in the due performance of judicial duty, so far as seen from the light in hand, in the whole subject matter of the administration being opened up; and, after some two years of investigation, at great expense, and by the aid of eminent counsel—every detail of such administration being gone into, without the aid, however, of the chief instrument in the matter, the receiver, who in the meantime had gone to render

his account in another jurisdiction,—it was found that, upon all grounds claimed, aside from those involved in the compensation of the receiver and his assistants, accountability existed for $15,221.54, and also for all sums paid to the receiver, his attorney, and counsel, upon grounds rendering them infamous if true; and now, after four years more of labor, including months of study here before dealing with the matter finally, we have not been able to escape the conclusion that the receivership was honestly conducted and that at the most there is liability for $524.26 on the ground of negligence, and an excessive allowance as compensation for the personal services of the receiver, and for expense incurred for the services of an attorney and counsel, involving no moral turpitude.

Standing as near as we may, as before indicated, where the parties whose conduct in question stood in the spring of 1897, some things that would otherwise be difficult to understand are reasonably plain. We must assume, in the absence of clear evidence to the contrary, that, from the first act looking to a final settlement to the end, every one concerned in it expected that the presiding judge would judicially close the matter before his term of office expired; that no act was done on the part of the receiver, his attorney, or counsel, or the presiding judge, that was supposed would prevent that consummation. We must also assume that those that came in time to act adversely, and their attorney, understood the situation, and that in all the proceedings leading up to the final conclusion they expected that the last act would take place before the expiration of the presiding judge's term of office.

The receiver, his attorney, and counsel prepared the final account, as appears, in March, 1897. Unusual attention was given, in doing so, to details. It was exceptionally complete. The only thing which seems to have been omitted therefrom, which some accounts often contain and which, by the policy

of our laws as to assignees, it should have contained (sec. 1701, Stats. 1898), was a statement of the amount claimed in the whole as compensation for the services of the receiver and his expenses for legal assistance. That is not very significant, inasmuch as such matters are often submitted to the court for adjustment regardless of any claim made for any specific sum. The report contained many schedules so constructed as to be easily understood by the presiding judge with the aid of his knowledge of the matter. There was one of a large amount of accounts receivable that came from the insolvent supposed to be of little value, with appropriate explanations, where that was thought necessary, these being accounts in the main subsequently sold to Mr. Thomas as detailed in appeal No. 1. It also contained a list of accounts created by charging to holders of collaterals money spent in endeavors to collect the same, the $524.26 passed upon in appeal No. 2 being one of them. Each of these accounts was accompanied by a reasonably appropriate explanation. The report contained other schedules, in the whole presenting the entire situation with exceptional completeness. As stated therein, as to all important transactions an advisory order was on file authorizing or sanctioning it. It is hard to do full justice to this report in a brief summary. Suffice it further to say that it suggests that the services of an expert bookkeeper, under the guidance of a skilled lawyer, were rendered in its preparation. It was verified May 18, 1897. With reasonable promptness it was presented to the judge with a lengthy petition referring to those parts ordinarily expected to be carefully examined, with reference to past and future action, and requesting a time and place to be set for settling the same and determining the compensation to be allowed the receiver for his services and the services of his legal assistants, and his discharge. The report was not immediately placed on file, but the evidence is to the effect that the judge took it into his possession for examination and

examined it. An order was promptly entered upon this report, authorizing the disposition of the stale accounts, and the few remaining articles of personal property, in the way in which such matters are usually conducted. The order was duly executed and the proceedings in that regard promptly and fully reported to the court and approved. The details as to this report sufficiently appear in appeals Nos. 1 and 2. This left nothing to be done but to pass finally upon the account. Preparatory to that a supplemental report was ordered June 24, 1897. That was filed June 30, 1897, the day set for the hearing of the account. It showed $14,242.68 to be dealt with in paying the final expenses yet to be adjusted, and creditors, in case of a residue. It showed upon its face that all payments which had theretofore been made to the receiver, his attorney, or counsel, for services and expenses, were paid upon account and as per the order of the court, suggesting that the final compensation, it was supposed, would be fixed at the end of the administration as is usual in such matters. This was the situation early in July, open to inspection by any one interested. As indicated, the report, upon its face, was an example of order and complete submission to judicial direction and observance thereof. The order prayed for upon the presentation of the report was signed June 3, 1897, and was on that day entered, the time fixed for the hearing being June 30, 1897, at the courthouse in Eau Claire, Wisconsin, at the opening of court on that day or as soon thereafter as counsel could be heard. Notice thereof was ordered to be given to all creditors in the usual way, that is, by publication of the notice and by mailing a copy thereof to every creditor having a valid claim, and to each of the stockholders, officers, and directors of the insolvent. Notice was given accordingly, and proof thereof was duly filed. No objection was made to the account till six days after the time set for the hearing, but the matter was yet open for that purpose. On July 6, 1897, one of the

creditors filed objections to the general character of the report as to definiteness, and vouchers, but not objecting, however, to the propriety of any matter when explained as was suggested the same ought to be, except as to $8,802.38 theretofore paid the attorneys, $524.26 involved in the Asheville matter, treated in appeal No. 2, $675.71 in the Bucyrus matter, treated in appeal No. 3, $161.71 paid for completing the Armour & Co. plant, treated in appeal No. 2, and $877.28 stated to have been expended in completing a contract, which does not seem to be involved in this litigation. These objections, it now seems plain, were based on the same erroneous ideas of the law that in the end ruled the trial of the case. A further and more definite account was prayed for, with a statement of the amount asked as compensation for services as receiver, the same to include the amount claimed by him for his counsel, the total to be in one sum or in two items at the pleasure of the receiver. An order was asked for, referring the account to a suitable attorney of the court to take the evidence respecting the same as to all matters objected to by the petitioning or interested persons, and to speedily report the same to the court. Thereafter, and July 16th, as appears by the record, not June 30th, as stated in the court's findings, an order was made referring the matters objected to, and many others. The language of the order now necessary to have before us is as follows:

"Take the evidence and report the amount kept and retained by said receiver for compensation for his services, and the amount of expenses and disbursements by him made, not included in the items hereinbefore enumerated, and specify the amount of such compensation for such receiver heretofore specially authorized by the court herein.

"Take evidence and report the amount and value of legal services rendered by counsel to said receiver herein, including such as may be necessary to finally close up said receivership.

"Take evidence and report the amount and value of the

services rendered by the receiver, as such, in the discharge of his trust, including such as may be necessary to finally close up said receivership.

"And it is further ordered that the official stenographer of this court attend the hearing of said matter before said referee and take all the evidence offered thereon the same as though said matter were heard by and before this court.

"And it is further ordered that said referee give due notice of the time and place of such hearing to R. E. Rust, receiver, and his attorneys as such, and to Peter Truax and his attorney, of the time and place of said hearing."

Pursuant thereto, with reasonable promptness, a hearing before the referee was commenced. So much time was consumed in the investigations, and so much time was lost by adjournments, that the hearings were prolonged so late into December as to render it apparent that the greatest diligence would be required for the rest of the time available in order to have the matter closed up before the termination of the term of office of the presiding judge. The length of time occupied in the hearings is indicated by the fact that $431.81 was ordered paid for referee's and stenographer's fees. The record shows that evidence was taken as late as December 28th, before the referee, long after it could have been expected that time would remain for the court to pass upon the matter if the practice were to prevail in regard to trials before referees as regards notice of the filing of the referee's report, time for exceptions, and a motion to affirm, modify, or set aside the report. The taking of evidence did not cease with that given before the referee. Other evidence was taken, as will hereafter be indicated, which no one expected the referee would consider, yet which all expected would be given its appropriate weight in the final decision to be rendered. From what has been said, we cannot believe but that it was understood by the attorney for the objecting creditor, as well as every one concerned in the matter, that the presiding judge would take up the report of the referee for consid-

eration and close the whole matter at the end of the year, and that all necessity for any notice of motion, other than possibly a short one, by means of an order to show cause, had been waived by the occurrences detailed, if not expressly. After December 1, 1897, events happened in rapid succession, all in harmony with the idea that time, though limited, was to be so utilized as to accomplish the purpose all had in view from the time of the presentation of the report early in June, 1897.

Though suspicion appears to be cast upon what occurred at the last, by the circumstance found that the order of reference, in form to take evidence and report the same with conclusions, instead of to take evidence and report the same, was made upon the insistence of Mr. Frawley and Mr. Hayden, we are unable to discover the evidence of such insistence. The finding seems to be based largely upon mere unwarranted inference, like many others to which we have referred. It is very definite, as if there were evidence in the record, definite and clear, showing the fact. Therein occurs this language, after that indicating that there was a contest in court between Mr. Frawley and the attorney for Mr. Truax in respect to the form of the order, the former contending for an order to hear, try, and determine and the latter to merely take and report the evidence: "Said Frawley prevailed." Our failure to find evidence in the record to support that has given us much trouble. So definite a finding, one would think, could not have found a place in the record without some tangible evidence to base it on, or some clear mistake of a serious nature. It is our judgment, after a thorough research, that the evidence preserved in the record not only does not support the finding, but is clearly to the contrary. True, there is an affidavit on file, sent here by supplemental return, which counsel stipulated might be used as a part of the record, and which was used at the time the proceedings occurred to vacate the order of December 30,

1897. That may have been the basis for the finding which was in the mind of the person who drafted it. If such affidavit was introduced as evidence, we can find no indication of it. Mr. Miner, who made it, does not appear to have testified upon the trial. The order of reference is a fair response to the petition. There is nothing on the face of the record indicating that there was any contention as to the form of the reference. We must conclude that the finding was inadvertently made, through circumstances heretofore alluded to. However, if it were true that Mr. Frawley preferred a reference to hear, try, and determine, and in the end findings by the referee were rendered unnecessary, we cannot perceive how such circumstance is material. They probably would not have been deemed material by the trial court or the learned counsel for respondents except for mistake of law.

The court found, in effect, that December 21, 1897, Mr. Frawley obtained, *ex parte,* a peremptory order closing the proceedings before the referee by December 27th, and ordering him to file his report by that time, and December 24th thereafter obtained a second such order to close the taking of testimony by December 29th and file the report December 30th. Orders to that effect were entered. The attorney for the contestant must have known of them. There is nothing to indicate that he objected thereto, and much to suggest that he consented to the same in advance, or submitted later. The natural inference is that he consented, fully understanding that the whole matter in controversy was to be finally closed up before the end of the presiding judge's term of office, and that such orders were judicial directions to that end, on the motion, largely, of the presiding judge himself. Such attorney had long known, we must assume, that all were working with such end in view, each actor expecting that no objection would be made to its being accomplished. That he shaped his course in harmony therewith is indicated by a paper he

signed, which appears in the record and will be presently referred to at length, showing that the additional time granted to take evidence, by the second order, was for his accommodation. It seems that, in the face of the undisputed evidence in the record that the order was drawn in accordance with the wish of the judge and the natural inference that all expected a speedy closing-up of the matter, the finding cannot be approved that the orders were obtained with bad intent. If the learned judge, waiting in his chambers for the report, expedited its coming, he but performed a clear judicial duty. If the attorneys who are said to have procured the order did so without judicial suggestion, their action indicates but a performance of professional duty. It was competent at this time, under all the circumstances, for the circuit judge to summarily order all of the proceedings before the referee to cease, though unfinished, to order a report to be made to him forthwith, and to conclude the matter himself in a summary way, save as time remaining enabled him to give the objecting parties opportunity to be heard.

Here, as well as anywhere, it would be well to observe that the theory that the statute, sec. 2871, Stats. 1898, and sec. 6, Circuit Court Rule XXII, as to trials of actions before referees and proceedings thereon, apply to a mere special proceeding like the one in question, resorted to by the presiding judge in order to obtain assistance in passing upon his receiver's account, is erroneous. The referee, when those orders were entered, was as much under the control of the court as a master in chancery under the old practice in proceedings to state an account for the information of the court. The hands of the court were by no means tied by any statute or rule, neither could they be tied by the attitude of any attorney in the litigation upon either side. The judge had power to make his own rules, to make them one day and unmake them the next, with or without notice, not transcending judicial discretion. Within that field he had absolute control

of the accounting by his receiver, answerable to no earthly tribunal but that of his own conscience. The broad judicial authority existing in such matters is probably sufficiently treated in the early part of this opinion, incidental to the jurisdictional question. That the learned judge, from his large experience at the bar and on the bench, so understood the matter, is evident from what he did. That, better than any oral testimony in the case, explains his treatment of the order of reference on December 30th—better than the idea that he regarded such order, as originally drawn, merely one to take testimony and report the same. We cannot agree with counsel for respondents that it will bear any such interpretation. The meaning of the language, "To take evidence and report the amount and value," etc., is unmistakable. However, it is quite evident that all parties in the last days of December, 1897, entirely lost sight of or disregarded such feature, or, what is more probable, regarded it as having been eliminated from the order, by the general course of all concerned, and particularly by subsequent orders. The one of December 24, 1897, requiring the taking of testimony to be closed by December 29, 1897, and the report to be made December 30th thereafter, of course could not have contemplated a careful consideration of the evidence by the referee and the filing of findings, in view of the record. Such order contained a recital that no further evidence upon any question was desired, except as to the compensation to be allowed to the receiver for his personal services, and for the expenses incurred by the employment of an attorney and a counselor, and that the attorney for the receiver purposed accomodating the attorney for the contestant by going with him, without notice, any reasonable distance, to take such evidence on that question as he might desire. Such recitals were in accordance with the facts as conclusively appears by what thereafter occurred. The order of December 21st bears on its face evidence that it was the presiding judge at this

time that was most active. It corroborates very clearly the evidence that he directed it to be drawn; not that it was procured, strictly speaking, by the attorney, Mr. Frawley, as the finding seems to indicate. It is in the form of an order by the judge, on his own motion, to his referee. "Let a copy of this order be served on T. F. Frawley, attorney for the receiver, and on F. M. Miner, Esq., attorney for Peter Truax herein, and this order to be filed with said J. C. Gores, referee," is the language used therein.

The concluding acts between the attorneys for the respective parties leave little ground, if any, for belief but that there was a mutual understanding that the original order was to be regarded as modified by the subsequent orders, in that they contemplated an immediate filing by the referee of his report upon closing the testimony December 29, 1897, any additional testimony to be presented to the court for its consideration. They are particularly significant in that they involved a favor to the contestant's attorney, which he improved. He was given time to go to a distant part of the state to take testimony which could not be obtained without the extra time given, and then not without the attorney for the receiver waived all requirements as to notice, which he did, that fact being recited in the order. Four days after the order was signed a stipulation was entered into between Mr. Frawley, as attorney for the receiver, and Mr. Miner, as attorney for the objecting creditor, which is so significant that it should have a place *in extenso* in this opinion. Omitting the formal parts it is as follows:

"It is stipulated by and between the above-named plaintiffs, by T. F. Frawley, his attorney, and Peter Truax, contestant, by F. M. Miner, his attorney, that the testimony of A. L. Sanborn, G. W. Bird and H. M. Lewis may be taken in the above-entitled action in shorthand by Mary E. Smith, a notary public in and for Dane county, Wisconsin, and by her extended in typewritten form, and that the signatures of the said witnesses to the same be and are hereby waived;

and that said testimony, after being so taken, may be transmitted by the said Mary E. Smith to the clerk of the circuit court at Eau Claire, Wisconsin, and that the same shall be by him attached to the testimony taken before J. C. Gores, as referee in said action, and shall be treated and considered a part of the testimony taken before said referee in all respects the same as though said testimony had in fact been taken before said referee.

"Dated December 28, 1897.

"T. F. FRAWLEY,
"Attorney for Plaintiff.
"F. M. MINER,
"Attorney for Peter Truax."

There is the plainest proof that all parties were co-operating to get the matter in hand finally disposed of by the then presiding judge. Prior to the making of that stipulation, the idea must have been abandoned that the referee was to do more than report the testimony as to the receiver's compensation and expenses. That seems evident. It had before this time been agreed, as the record conclusively shows, that the objections made by Mr. Truax had been sufficiently met. He made no objections to the mere amount of compensation to be allowed for legal services, but he prayed that the referee might be required to state what was claimed in that regard, and for receiver's compensation, either in a lump sum or in two items, one covering expenses for legal services, and one covering receiver's compensation. The indications are unmistakable that the parties to that stipulation had an understanding that the evidence to be taken was to be presented to the court for consideration without any formal notice by the attorney on one side to the attorney on the other. Depositions were taken under that stipulation and filed as contemplated therein. Thereafter Mr. Frawley, at the request of the receiver, drew his report. It appears by the findings and by the argument of the learned counsel for the respondents that such circumstance, in the conclusion of this case,

was regarded as significant. There is no finding and no claim, as we understand it, but that the report as drawn was in accordance with the facts, and fairly prepared, considering, as we must, that the parties understood that the matter of compensation for the receiver's services and expenses for legal services was to be settled by the court. It substantially responded to the original order of reference except as to the particular matters objected to by Mr. Truax, which the evidence shows had been satisfactorily explained before the referee, and that part with reference to reporting the amount and value of the services of the receiver, his attorney, and counsel; which latter feature was not a matter asked for by Mr. Truax in his petition. It only asked, as before indicated, a report to be placed on file which should show the amount claimed by the receiver and his attorneys in one or two amounts at his pleasure. Of course, in this we consider the general objection to the charges for attorneys' fees paid, to have been based, either on the erroneous idea afterwards urged with success that under the circumstances no such expenses were allowable, or the idea that the objection was limited to the feature which the prayer distinctly asked to have supplied. It was on the court's own motion that the reference was ordered, to take proof and report conclusions as to the amount and value. If that had not been waived by the parties and abrogated by the court, before the report of the referee was made, it was competent for the court to abrogate it at any time.

In view of what has been said, the circumstance that the referee's report was drafted by Mr. Frawley seems to be of little significance. The fact that there were some 600 pages of evidence, is also of no great moment, as regards the particular matter under consideration, since none that bore on any contested question, except the amount and value of the services rendered by the receiver and his legal assistants, was required to be examined. The report had to come into court

on December 30th anyway. There was no time for a studied judicial determination by the referee, and he was not expected to make any. That seems evident. The circumstance of Mr. Frawley's drawing the report merely shows conformance to the practice criticised in this opinion. Maybe it would have been better for the referee to have drawn his own report. We think it would. But it is as well for a referee to permit the labor which in legal contemplation devolves upon him as regards preparing his report, to be performed by the attorney for one of the contesting parties, as for the presiding judge to do the same thing as regards his findings of fact and conclusions of law. However, if it is entirely nonprejudicial in any case, it is where there is no contested question, as in this instance, which the referee is expected to pass upon.

On the morning of December 30, 1897, the report of the referee was placed on file. The final act in which the attorney for the objecting creditor was concerned leaves little room to doubt that he expected it might be taken up for consideration on that day. He was personally notified that the court was ready to proceed in the matter, as the findings state. It is found that he refused to be present, relying on the statute and the rule to which we have referred. That is not consistent with what had occurred. Mr. Miner was as much bound morally to appear, if necessary to give the court jurisdiction to act, as if he had entered into a written stipulation to do so. To his credit, so far as it goes, we are unable to find definite evidence sustaining the finding. He was not sworn. The messenger sent to notify Miner testified that he said to him, he was requested to say that the court was waiting for him in order to take up the settlement of the receivership matter, to which Mr. Miner replied: "There is no matter coming up at the courthouse in which I am interested, in which any notice or motion or order to show cause has been served upon me, and I do not propose to go over there. I

have had no notice of any motion in any matter in which I am interested, and do not propose to go to court." We have not Mr. Miner's version of this interview, except as it appears in the supplemental return to which we have heretofore referred. Since the affidavit thus sought to be made evidence does not appear to have been used as such upon the trial, it hardly seems proper to consider it now. If Mr. Miner had been sworn upon the trial and subjected to cross-examination, an entirely different situation might have appeared from what appeared in his affidavit. It is not the practice to allow evidence to be introduced in this court which was not introduced upon the trial below, in order that a judgment may be sustained or impeached, even when counsel agree that it may be done. However, if the affidavit were considered as evidence, probably it would not change the situation. Certainly, the appearances as regards the person involved, who is not a party to the litigation, are better with it out of the record than with it in. It may be that he supposed some time would be given him to make his appearance, such time to be fixed by an order to show cause. That would not be unreasonable in view of all the facts we have detailed. There was time to have given such notice. We will refer to that later. The evidence in the record goes no further than to show that Mr. Miner declined to aid the taking up of the receivership matter by his presence, without any formal notice, preferring to stand upon any rights which he had in that regard, in case proceedings were taken in his absence resulting in a conclusion not satisfactory to his client. He had a legal right to do that; whether he had a moral right to do so under the circumstances is another question. As we have had occasion heretofore to say, courts must leave parties and witnesses as well, on strictly moral questions, to be dealt with by other than judicial tribunals.

Now we have this situation: The court in session in the closing days of the presiding judge's term of office, with this

great matter undisposed of. Everything was before him for action. The matter in controversy as to everything contained in the adverse creditor's objections was in effect out of the way, except what the judge saw fit to substitute in place of a claim in writing by the receiver as to the amount of compensation for his services and his expenses for legal assistance. All the evidence both parties wanted to submit before the referee or the court was on file. There was a written stipulation, which the court had a right to regard, in connection with what had been done, as a recognition by the objecting creditor that the matter was to be fully settled on the 30th of December, or at least before the termination of the judge's term of office. Everything is consistent with that. It appears so certain as to leave no reasonable doubt on the question. The receiver was present with his attorney and counsel. At the last moment, if we are to believe the findings, the court and the attorney and counsel, rightly believing that it was in the power of Mr. Miner by his absence to disable the court from settling its receiver's accounts, were led to and did resort to unprofessional proceedings, and obtain participation therein of the receiver and the presiding judge, to the end that the referee's report might not, because of its form, preclude the court from acting in the matter of closing up the receivership as was contemplated. Whether Mr. Miner at this time considered that the power of the court to exercise its functions was dependent upon his attitude, we will not disturb the finding or say more in regard thereto. So far as the findings are to the effect that Mr. Miner could by his conduct prevent the court from settling the receiver's account, they are erroneous.

That part of the finding now most important is quite lengthy. To review the same in detail and show the reasons why it cannot be supported, would only lead to a repetition of much that has been said. We will take up, briefly, the leading features.

First, it is said the report was fraudulently withdrawn from the files. That is based on an inference, which could not have been drawn except for a misconception of the law, as before stated, as to the right of the court to proceed regardless of the statute and the rule on the subject of trials before referees, in the treatment of their reports. It does not seem to be supported by the evidence, because that seems undisputed to the effect that what was done was in execution of the mandate of the judge delivered from the bench. It is found that the referee signed a new report upon the statement being made to him privately that the court had so ordered. He testified, and there appears to be nothing impeaching the same, as follows:

I made no objection to signing the new report because I heard the court make a ruling that all I was required to do in this matter was to sign a certificate reporting the evidence. That order was made before such discussion [discussion about some rule affecting the matter]. It was made immediately after I came into the courtroom. When I was coming in I heard the judge make such verbal ruling.

This evidence seems to have been overlooked in making the findings, or else it was deemed to be rendered false by legitimate inferences from what was done. The finding is to the effect that Mr. Frawley, with bad intent, procured the omission from the first report of all mention of the subject of compensation to the receiver, his counsel, and attorney. That is evidently found by inference from the supposed general fraudulent intent, of which we have been unable to find evidence. There was no definite evidence as to why the omission was made, but the circumstances we have heretofore referred to all indicate that it was supposed the court had concluded to adjust the matter without any aid from the referee's opinion, that all parties so understood it, and no one better than Mr. Miner. There is evidence tending to show that the court, Mr. Hayden, and Mr. Frawley, considered

Mr. Miner's attitude, and deemed it inconsistent with the general understanding with which the matter had been handled, especially the stipulation signed by him. The other facts found by the court in respect to this matter are detailed in Nos. 226 and 227 of our statement. All elements of bad intent or wrongful conduct mentioned in the findings, it seems, are unsupported.

It is probably true, as found, that the possibility of Mr. Miner's endeavoring before the incoming judge to make some point on his not having had a notice of motion, in due form, of the hearing, was discussed. Rules were, it seems, spoken of. What rules, is left to conjecture. It may be that the statutory and other practice as regards trials before referees was a subject of discussion, and to obviate any difficulty in that regard it may be that it was concluded not to have on file, if it could be avoided, any report after the manner of a finding by a referee appointed to hear, try, and determine an action. If so, the record appears to us clear that it was the trial judge who was responsible for the change in the report. It would have been more orderly, probably, not to have made such change. There was no need for it in order to enable the court to settle his receiver's account. It was, it seems, a matter of overcaution, done to satisfy the fears of counsel. The evidence is to the effect that there was discussion by counsel in the courtroom; that then the order was made from the bench; that later there was the discussion, which is mentioned in the finding in a way to indicate that it was initiatory to what followed instead of following the direction from the bench.

Enough has been said on this subject. The conclusion is that the finding of bad intent as to the filing of a mere certificate reporting the evidence taken by the referee is not supported; that the whole matter was done under the direction of the presiding judge in the exercise of his undoubted jurisdiction, and that he acted summarily under the circum-

stances, either because he deemed the order of July 16, 1897, in effect modified by the subsequent order, or that the feature in question had been waived by the parties, or that by their conduct they were estopped from insisting upon it, or that it was his duty, if necessary, to take the subject of settling the matter in hand to himself, summarily vacating that feature of the order, if necessary to enable him to proceed to the final settlement of the trust. On the last proposition we apprehend the presiding judge had no doubt as to his authority in the matter, so long as he kept within the boundaries of discreet action.

The next thing that occurred after the new report was placed on file was the entry of the final order, which occurred without much delay, the indications being that it was signed soon after the noon hour. The findings are to the effect that many of the recitals in such order are untrue, specifications being given. To warrant such a finding pretty clear and satisfactory evidence should be produced. If the order will admit of a reasonable interpretation, under all the circumstances, relieving court and counsel from such a charge, it should be favored. If such a construction cannot be discovered, and the false statements can yet reasonably, under all the circumstances, be attributable to mere mistake, that theory should be favored. If neither truth nor innocent mistake can be reasonably discovered, but the wrong of the matter under all the circumstances can reasonably be attributed to negligence, we should incline to that view before finding facts creating liability even in a civil action, where it necessarily means that the parties charged were guilty of criminal conduct. Without the considerations to which we have referred, great injustice is liable to occur in such matters. The maxim that it is better that many guilty men should escape than that one innocent man should be convicted has some application in the circumstances suggested. This court at an early day held that an alleged civil liability grounded

on criminal responsibility should fail unless established beyond reasonable doubt. *Freeman v. Freeman,* 31 Wis. 235. That later was abandoned, and of course is not the law. *Poertner v. Poertner,* 66 Wis. 644, 29 N. W. 386. But the rule still is so far adhered to that the proof in such cases is required to be clear and satisfactory; though a preponderance of the evidence, if it meets that test, is sufficient. The danger of reading criminal conduct, by construction, out of a paper that may be viewed from an aspect consistent with innocence may be appreciated when we observe that a mandate of this court, framed with all the care that could reasonably be devoted to it, and approved by all the members of the court after a careful examination thereof to the end that court and counsel subsequently to execute it might have no reasonable doubt as to what course to pursue, may become a subject of controversy in that regard, resulting, after expensive litigation, in a judgment necessarily coming here for review, largely respecting the meaning of that mandate.

We confess that there are some recitals in the order under discussion as to occurrences leading up to and characterizing its presentation for the court's signature, not easy to be understood, and that might well have the meaning attributed thereto by the trial court if the aspect in which it was there viewed is proper; but it is not. We cannot escape the conclusion that if the bad intent found actually existed, the circuit judge himself, and his referee, must have been parties thereto, either actually or constructively. It seems that had the erroneous idea that fraud permeated the whole of this matter from start to finish not been discovered as supposed, the severe indictment of wrongdoing contained in the finding in regard to this order would not have been embodied therein. Things look far different when viewed inductively, conclusions entirely waiting upon a discovery of the particulars, from when viewed deductively, assumptions being indulged in, supposed to be warranted, and particulars searched for

harmonizing therewith. True, in any view, there are some recitals in the order not easy to understand. One of them is this, speaking of the order of reference:

"Required and directed by said court, to wit: to report the evidence taken upon such hearing to the court, and such being the construction placed upon such order of reference by the parties and by the court, to wit, being an order of reference to take and report the evidence."

But when the whole situation is reviewed as it existed at the time the order was signed, it seems reasonable to conclude that such language referred to the meaning to be attributed to the order in the light of subsequent orders entered by the court, the conduct of the parties generally, the practical construction apparent, particularly by the circumstance of the stipulation of December 28, 1897, and the action of the parties thereon in the taking of testimony and the filing of the same in the office of the clerk of the circuit court instead of with the referee.

There is a sufficient explanation that can be given to all recitals in the order of December 30, 1897, to preclude holding, reasonably, that it was drafted with bad intent, when we leave out of view the many elements to which we have referred, that were erroneously given weight in the case. When we look backward over all the facts that have been considered, appreciating that, in the candid oral evidence of Mr. Frawley that, though his professional conduct in the administration of the trust might have been wrong as regards legal principles, he believed it to be right when the acts criticised were performed, and still believed so, he not only spoke truthfully, but was right; and appreciating that, at the last scene in that courtroom on December 30, 1897, the presiding judge, as was testified, not only proceeded according to his views of the law respecting his right to act summarily, if necessary, not transcending judicial discretion, to close up the receivership, but with a correct understanding of his

duty: the scene, so vividly pictured in the court's findings, of three lawyers of high standing at the bar, among whom were those who had passed into the evening twilight of life and of a long and distinguished career, wickedly colluding in a side room off the temple of justice, under the forms of law to consummate grand larceny, so to speak, of the funds in their keeping as the instruments of the law, in trust for many persons who had no representative at hand,—and accomplishing their infamous purpose with a referee and a presiding judge as their stupid, negligent, or willing tools,—disappears; and in its place we see the picture of court, attorney, and counsel endeavoring, in the last days of the presiding judge's official life, to do what, if possible within the rules of law and reason, could be done to fully perform the duties resting upon them respectively, and accomplishing it without fault, unless it be found in indiscretion. The determination covered by the order the judge, as the court, had a right to make when and in the manner he did, if he gave that consideration to the matter necessary to enable him to pronounce a reasonably just judgment as to the right of the receiver to compensation and expenses. The control of the judge over such matters we have heretofore sufficiently referred to.

From the conclusions already reached it seems plain that the theory upon which the learned trial court held that the receiver and his assistants did not render faithful service in administering the trust and hence that they were not entitled to anything for their services and should restore all sums paid to them therefor, is all wrong. If there is any error in respect to the mere procedure of December 30, 1897, it consists in indiscretion. Counsel for appellants contend that if the element of fraud discovered by the trial court is held not to exist, the whole cause of action as to them must fail. That we have already shown to be erroneous, as this is not a cause of action for damages on the ground of fraud, but one for

an accounting for money received by the persons charged, to which they are not entitled, and for which their legal representatives, as successor possessors of their property, should account, and is a mere part of a greater cause of action, as has been before indicated.

There is no difficulty in reviewing the matter because of a change in the judicial head of the court. The December term of the circuit court for Eau Claire county survived the change as to its presiding judge, and included the time when, as ruled over by his successor, the order in question was vacated. So the rule precluding an order or judgment at one term being vacated at another, except pursuant to sec. 2832, Stats. 1898, does not apply.

It may be that excusable negligence on the part of the attorney for the creditor, Mr. Truax, was shown, which would have justified action under sec. 2832, Id. We are inclined to the opinion that it would. The judge of the court at the time the order of December 30th was vacated, had the same authority to take such action as his predecessor would have had, if the latter's term of office had continued to the time thereof. So we really do not need to consider whether there was abuse of discretion in granting the order of December 30, 1897, so much as we do whether there was such abuse in vacating it. True, though a judge who comes into power, as here, possesses authority, in a sense, to review decisions of his predecessor, as under the circumstances of this case, such authority should be exercised with great care. The doctrine that one judge of co-ordinate jurisdiction with another should not sit in review upon that other's judicial acts other than under some extraordinary circumstances rendering it clearly necessary to prevent a miscarriage of justice, is well understood. In England, as regards chancellors, it is prohibited by statute. In this country it is quite as effectually prohibited by judicial policy. *Coon v. Seymour,* 71 Wis. 340, 37 N. W. 243; *Fenske v. Kluender,* 61 Wis. 602, 21

N. W. 796; *Cardinal v. Eau Claire L. Co.* 75 Wis. 404, 44 N. W. 761; *Crowns v. Forest L. Co.* 102 Wis. 97, 101, 78 N. W. 433. Authorities here in respect thereto are mainly confined to instances where one circuit court attempted to pass upon or interfere with the execution of some order or judgment of another such court; but the same principle applies where one circuit judge is called upon to review the judicial acts of his predecessor in the same case. The highest court in New York, in *Matter of Livingston,* 34 N. Y. 555, made this emphatic declaration on the subject:

"Although we have no statute which expressly prohibits one judge from rehearing a matter decided by another judge, the rule is so well established and is so important for the protection of parties from unjust vexation, that if it has not already been, it is full time it should be incorporated into the equity law of this state."

Chancellor WALWORTH, in *Winship v. Pitts,* 3 Paige, 260, speaking on the same subject, said:

"After a decree has been made by the chancellor, it is not competent for any vice-chancellor to make an order or decree which would, directly or indirectly, discharge, alter or modify the same."

To the same effect are *Greenwich Bank v. Loomis,* 2 Sandf. Ch. 70; *Astor v. Ward,* 3 Ed. Ch. 371. In the last case cited a vice-chancellor refused to rehear a matter passed upon by his predecessor.

From what has been said it will be seen that a successor judge should never assume the function of reviewing mere matters of judgment of his predecessor. To do so is such a flagrant violation of established practice as to constitute reversible error of a jurisdictional nature. One of the familiar rules in equity matters is that a plain prejudicial violation of established rules of practice constitutes reversible error. *Woerz v. Schumacher,* 161 N. Y. 530, 56 N. E. 72.

Notwithstanding the foregoing, doubtless when a case is

presented to a circuit court, showing clearly to the presiding judge that an order in a case yet pending was granted by his predecessor corruptly or through negligence, or by reason of fraud perpetrated by the applicant therefor, or without the opposite party's being heard, through excusable mistake or neglect on his part or his attorney's,—such fault that the judge who granted the order, were he in a position to do so, could properly, and probably would, relieve him therefrom,—the successor may properly act in the matter, opening the way for a rehearing, if to him it seems that justice cannot otherwise be obtained. So while we fully recognize the rule contended for by appellants' counsel, it is not one creating an absolute disability of a judge to set aside an order made by his predecessor, where the latter, if in office, might do it.

The foregoing suggests that the action of the court in granting the order of December 30, 1897, should be considered in the light of everything characterizing it. The circumstance that the judge, of his own motion, on July 16, 1897, made the reference to take evidence and report the same with an advisory suggestion as to the amount and value of the services of the receiver, his attorney, and counsel, shows, as the fact is, that the subject involved, even from the standpoint of the judge who had been familiar with it all the way through, considerable difficulty. It must have been appreciated from that time on that the matter involved would come before the court for final determination, as we have several times indicated, before the expiration of the judge's term of office, and that even with the advisory opinion of the referee, some time at least would need to be devoted to a review of the evidence taken. The failure of the referee to finish his labor and file his report was taken notice of, as the record shows. The oral testimony is to the effect that the judge made inquiries in respect to the matter. It was in his power, at any time, as we have seen, to discharge the referee

and take the whole matter to himself, and, giving parties such opportunity to be heard as seemed reasonable under all the circumstances, take up the matter and consider and dispose of it. So, in a measure, there was judicial fault in not compelling an earlier report by the referee. That, it seems, the judge appreciated, when he made the order of December 21, 1897, in effect informing all concerned that the matter must be closed up and the report filed December 27, 1897. It must have occurred to him before that the condition of the proceeding before the referee was greatly weakening the court's ability to deal with the matter for want of time, as in the closing days of his term of office there would necessarily be many things requiring attention. His action December 21, 1897, he might well have taken earlier. In such a matter the judge need not wait to be put in motion by the attitude of counsel. The order of December 24, 1897, is excusable so far as parties represented were concerned, which included the only active objecting creditor and the receiver and his legal assistants; but the great mass of creditors, as appears, were relying wholly upon the court. The receiver stood for creditors, generally speaking, but in this proceeding, in a sense, he was in an adversary capacity as to them. The last order, it seems, was a mistake, when it is considered that the court was determined, and properly so, to close the trust before going out of office on Monday, January 1, 1898. When the report of the referee was before the court with its mass of evidence, conflicting in character, as to the matter to be decided, it should have been appreciated that deliberate treatment thereof was necessary. There was no fault in the act of relieving the referee from the duty of making a finding in respect to such matter, but it increased the amount of diligence which the judge should have devoted to it. It seems, as before indicated, that the whole of the forenoon of December 30th was taken up with the general business of the court, and with the preliminaries to taking up the report

for consideration. While the judge probably appreciated that Mr. Miner was making a mistake in supposing that by his mere absence he could paralyze the arm of the court to settle with its receiver, he should also have appreciated that the penalty, if any were to be suffered, would fall upon Mr. Miner's clients and on the army of unrepresented creditors. So the attitude of Mr. Miner, though wrong, should have been regarded as increasing the degree of care to be devoted to the matter in hand rather than rendering action *pro forma* permissible or proper. True, the referee, his attorney, and counsel, were in court, demanding judicial settlement of the matter. There was no wrong in that unless it were error of judgment in unduly pressing the matter when there was yet time. They may have called the court's attention to the amount and value of their services as shown by the evidence taken. It is more than probable that they did. We must assume that the court was informed in some way as to the trend of the evidence on the part of the receiver, before finally adjudicating the matter. If so, and it was by way of a statement by counsel as to what the evidence tended to prove, there is nothing wrong in that. The counsel were supported by evidence of eminent members of the profession, and other expert evidence, and their own honest judgment as to the amount and value of their services. It was for the court, of course, to determine how much they were entitled to in view of all the considerations legitimately bearing on the question, which included his personal knowledge as the most important factor in the circumstances of this case. *Taylor v. C., M. & St. P. R. Co.* 83 Wis. 645, 53 N. W. 855; *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250. However, the time had come when the interests of the receiver were on one side and those of the creditors on the other. The former was represented before the court, the latter were not. The creditors were entitled to all the protection which such an examination of the evidence and such

attention to the matter as time would reasonably permit would afford, the diligence in that regard to be measured somewhat by the delay in taking the matter up. Now as we understand the record, pretty soon after the noon hour,—the indications are, promptly thereafter,—without any study of the evidence, without any opportunity to know what was in the report except by general statements of the interested parties as to its general effect, which if made at all were no doubt honestly and fairly made,—the blanks in the order previously prepared were by direction from the bench filled in, specifying the allowances to be made, and it was then signed, and the matter thus ended. We do not doubt but that the learned judge was very much pressed for time. We see nothing to impeach the good faith of any one concerned, yet it seems that the diligence which discreet conduct would have brought to the matter was hardly given thereto. It is more than probable that it was thought, and not without good grounds, that in any event the surplus of funds on hand over and above the necessary amount to pay expenses was so little as to not be worth the trouble and expense of making a distribution, and that such idea led to the belief that the creditors were really not interested. That is indicated from the wording of the order, showing that it was anticipated there might not be enough in the hands of the receiver to pay the allowances made. It hardly affords a satisfactory excuse for a *pro forma* granting of an order turning over to the receiver and his legal assistants whatever there was for a division between them on a basis fixed by the court. The limited amount of time available does not satisfactorily explain the haste in settling the matter which characterized it. The judge's term of office did not, as we have heretofore indicated, expire on the 30th day of December, 1897. He had until noon on Monday, the 1st day of January, 1898, the day when his successor's term of office was to commence, to close up the business in hand. *State ex rel.*

Emberson v. Byrne, 98 Wis. 16, 73 N. W. 320. That may not have been appreciated. It gave him one day and a half after December 30th, if we count Sunday, which, though not a day for business, ordinarily, need not in a case of necessity be wholly ignored. There was time for a pretty thorough investigation of the evidence filed by the referee, time to have had other witnesses called than those who had testified, if thought necessary, time to have examined the parties interested in open court, even time to have relieved Mr. Miner's client of all danger of being prejudiced through his attorney's mistake as to the law by removing the latter's scruples to making an appearance in court except in response to an ordinary notice of motion or an order to show cause. To take up the matter and dispose of it summarily, even under the press of circumstances, which to a great extent legitimately existed, it seems, was an indiscretion. That does not cast any serious reflection on the learned circuit judge or other parties concerned. If presiding judges were to be condemned merely for indiscretion, and members of the bar likewise condemned for making presentations to the court leading thereto, there would be few who would escape. If the learned judge in this instance had possessed the opportunity, upon reflection, to vacate his order of December 30, 1897, and to give the matter deliberate consideration, it is quite probable that he would have done so. It follows from this, that there was no reversible error in vacating the order as was done in any aspect of the matter in which it can reasonably be viewed.

Whether the determination made by the order was really prejudicial or not is the next question. In considering that, notwithstanding what has been said, some weight must be given to the determination at first made. It at least represents the judgment of one who was better prepared than any one else could well be to make the proper allowance, if correct rules were observed.

There is no *per diem,* percentage, or salary rule that governs in fixing the compensation to be paid to a receiver for his services, yet there are some rules to go by. He is entitled to compensation for services of the kind required of a business agent having regard to the nature of the matter administered, the amount involved, the complications attending it, the time spent, the degree of success attained under all the circumstances, the fidelity to details, the appreciation evidenced as to the responsibilities of the position, the character of such responsibilities, the expedition with which the trust has been administered in view of results reached, the method, character, and promptness of the accounting, and many other things that could be suggested, having regard, of course, to what is commonly paid for somewhat similar services in the performance of official duties, not the standard in private business transactions. *Union Nat. Bank v. Mills,* 103 Wis. 39, 79 N. W. 20; *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N. W. 243; *Stuart v. Boulware,* 133 U. S. 78, 10 Sup. Ct. 242; Gluck & Becker, Receivers, 535; High, Receivers, § 782; Beach, Receivers, sec. 761; Wait, Insolv. Corp. § 223. Precedents do not help much, as it is impossible to find any two cases alike in their facts. In *Karn v. Rorer I. Co.* 86 Va. 754, 11 S. E. 431, the term of office was twenty-two months. The gross receipts in money handled were $35,000, and the receiver was allowed $3,375. In *Schwartz v. Keystone O. Co.* 153 Pa. St. 283, 25 Atl. 1018, the amount handled was $96,000, the work in the main was done in six months, largely by employees under the supervision of the receiver, and he was allowed $4,000. In *Union Bank Case,* 37 N. J. Eq. 420, a receivership of a bank lasting six years, about $200,000 being collected and distributed, the allowance was $22,000. In *Stuart v. Boulware, supra,* a receivership lasting some five years, the receiver giving a bond for $50,000, caring for property from which was collected rents to the amount of $100,000, which was disbursed,

and which property was sold under the supervision of the court for $380,700, the receiver was allowed $6,500 for his services and legal expenses. These citations are sufficient to indicate that such matters, in the decided cases, are not governed by any definite rule. The range of compensation in many instances seems quite low as compared with what was allowed in this case, and in other instances the indications are to the contrary. This court in *Speiser v. Merchants' Exch. Bank,* laid down a rule, which we are disposed to adhere to, that in such matters the standard should be that of public, not of private, service, and that doubts shall be resolved in favor of the trust.

Courts should strive to make trusts for the benefit of creditors all which the name signifies, not trusts for the benefit of the trustee and his employees, which is too often the case, tending to scandalize the administration of justice. If there is any repository where property for the benefit of creditors can be located, which is safe, and will ultimately render to them everything that can be made available by economical, judicious, honest management, and which should excel all others, it is the circuit courts having jurisdiction of such matters. Much significance should be given to the policy established here for the judicial administration in this state; that is, that the standard of compensation of receivers is the amount paid for somewhat similar services in official work. In most jurisdictions the standard is far different. Generally it is that ordinarily paid for the performance of somewhat similar services in ordinary business pursuits; while in some cases it has been said that the responsibilities and accountabilities and duties of a receiver are so peculiar that he should be allowed a greater amount to compensate him for his services than would be obtainable by the head of a similar institution, if managed privately. Gluck & Becker, Receivers, 101.

Applying the principles stated, to the case in hand, in

view of the fact that the receiver employed two eminent lawyers, accustomed to charge for their services $50 per day each, and the time necessarily occupied in administering the trust, the allowance of $7,500 is much too large. The trial court found that one year and a half was time enough in which to have entirely closed up the receivership. That cannot be taken as quite correct, because many things were regarded by the trial court as outside of the receiver's duties, which we hold were not. But it seems that two full years for the whole matter, aside from time occupied in settling the account, were enough, and that upon the standard established for measuring the compensation, in view of all the circumstances, $5,000 would be quite a liberal allowance, that to cover the time required in settling the account up to and inclusive of December 30, 1897. The salaries of state appointive officers who have charge of interests very much larger than were involved in this case, and who are required to devote their whole time to the duties of their positions, are but $2,000 per year. We hold that the allowance to Mr. Rust, for his services up to and inclusive of the settlement of his account, over $5,000, was excessive.

The considerations above mentioned, as regards the receiver's compensation, in many respects govern in determining the amount allowable to him on account of the services of his attorney and counsel. Such services are not to be compensated for as has been supposed, as a matter of course. A receiver is not permitted to employ an attorney at the expense of the creditors unless the services of one are reasonably necessary, and then only to the extent reasonably required, and of course is not permitted, except in extraordinary cases, to employ one person as attorney and another as counsel, and to draw the salary of a trained business man himself, who, ordinarily, does not require the aid of an attorney in conducting his business. The tendency of administrative courts is to be too lax in such matters. They must

aim to a higher standard,—aim to deal with receiverships as important public trusts, making the element of private gain, as regards their business agents and their legal assistants, a secondary consideration, so far as that can reasonably be done, which can probably best be attained by applying, pretty strictly, as the standard for compensation, the amount ordinarily paid for similar services in official life. Precedents will not better help in this matter than in determining the amount which should be paid for the services of a receiver,—probably not so much.

The reasonable necessities of this case did not require the permanent employment of two distinguished lawyers, one as attorney and one as counsel. Either one of the learned gentlemen, as appears from the evidence, was eminently capable of filling the position, both of attorney and counsel, as is usually done, especially in public matters. True, a very large amount of work was done, and in a most methodical way. But much of it was of the kind commonly performed by law clerks, as we must assume it was in this case. The compensation allowable, it must be understood, is not the value of the work actually done by the attorney to be computed from the time spent and the amount which an attorney customarily charges his clients, but it is what may appear to be proper for the work that was reasonably necessary to the due administration of the trust by the standard heretofore indicated. *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250. The time actually spent and work actually done are important elements, but the controlling feature is the work reasonably required. There must also be considered, of course, the character of the work, the manner in which it was done, and the beneficial results to the trust. Where the work is of a character commonly performed satisfactorily by an attorney who would not be reasonably expected to charge in private transactions at a greater rate than the average standard for professional services, a receiver would not

be justified in employing an attorney accustomed to be compensated by a much higher standard on account of his experience, expecting to make compensation for such services on such extravagant basis an equitable lien upon the trust fund.

It is our judgment that if the learned judge who made the allowance of December 30, 1897, had applied the law, as we must deem it to have been established for the courts of this state, the allowance to the receiver on account of his legal assistants would not have exceeded $10,000. That we fix without much regard to the fact that two attorneys instead of one were employed. If only one had been employed, in our judgment the sum named would not be very much less than the amount above indicated. The allowance is to the receiver, not directly to his attorney. Beach, Receivers, sec. 308; Gluck & Becker, Receivers, 354, 360; *Richardson v. Tyson, supra; Stuart v. Boulware,* 133 U. S. 78, 10 Sup. Ct. 242. Whether that be divided, part being paid to the attorney and part to the counsel, is not material to the court or the creditors. However, since the receiver submitted to the court the question of how much should be allowed for services of the character rendered by Mr. Hayden, and what should be allowed for services of the character rendered by Mr. Frawley, separately, and Mr. Hayden and Mr. Frawley joined therein, it was proper to accord to the parties a decision of the matter, and we will do the same. In our judgment the proper allowance on account of the services rendered by Mr. Frawley should be fixed at $7,500, and the proper allowance on account of the services rendered by Mr. Hayden should be fixed at $2,500. We have determined those amounts from a careful study of the subject in all its bearings, and believe the same to be the limit of what correct principles will clearly justify.

The claim is made that the excessive allowances for legal services cannot be recovered of the receiver, since he paid

the same over on the order of the court, and there was no appeal with a stay of proceedings, the rule announced in *Maxwell v. Bank of New Richmond,* 101 Wis. 286, 291, 77 N. W. 149, *Florida Central R. Co. v. Bisbee,* 18 Fla. 60, and Gluck & Becker, Receivers, 356, being cited. *Maxwell v. Bank of New Richmond* clearly does not apply. There an equitable lien on property acquired by garnishee process was discharged by a judgment in favor of the garnishee. There was an appeal from such judgment without any proceedings being taken to continue the lien till the termination of such appeal. The garnishee in that situation, *bona fide* parted with the property of the principal debtor. In those circumstances it was held that the reversal of the judgment did not revive the lien; that the garnishee was a mere stakeholder and was entitled to be protected on equitable principles. It is entirely unlike a case where one pays money to another under a judicial order, which is afterwards set aside. The other authorities cited by counsel are to the same effect as the one reviewed. Money in the hands of a receiver sequestered for the benefit of the plaintiffs, having been on the order of the court paid to the plaintiffs' attorney, he having an equitable lien thereon as regards plaintiffs' rights, and thereafter the judgment upon which the sequestration was based being reversed, it was held that no right of action thereby accrued in favor of the defendant against such attorney to recover back the money. It was said, however, that the right of the defendant whose money had been thus diverted, to recover the same of the plaintiffs for whose benefit it was used, was undoubted. Of course, in such circumstances, by the enforcement of the liability against the plaintiff, no cause of action would accrue over against the attorney who received the money, because it was paid to him merely to satisfy the valid indebtedness of the plaintiff. The general principle that when a judgment has been enforced, and is subsequently reversed, a right of action is thereby created

in favor of the prevailing party against his adversary to recover the money back, is not in conflict with *Florida Cent. R. Co. v. Bisbee, supra.* On the contrary it is there most distinctly recognized, the following on the subject being quoted from *Bank of U. S. v. Bank of Washington,* 6 Pet. 8:

"The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right."

In *Clark v. Pinney,* 6 Cow. 297, the law on the subject is stated thus, where the money was paid on a judgment of a court of common pleas, which was afterwards reversed on error, the court holding that it might be recovered back in an action of *indebitatus assumpsit,* for money had and received. That is a leading case. It will be found cited with great frequency. The principle there announced has been applied in many instances of money paid pursuant to a judicial determination, sometimes upon judgments and sometimes upon orders, the particular form of the judicial determination not being important. *Scholey v. Halsey,* 72 N. Y. 578; *Haebler v. Meyers,* 132 N. Y. 363, 30 N. E. 963. In the last case the money was paid relying upon an order of the court which, so long as it stood, justified the same. The doctrine is of common-law origin, and will be found incorporated into the statutes of many of the states. In such instances it has been held that the statute is merely cumulative. *Haebler v. Meyers, supra.* The philosophy of the rule is that, where a person receives money pursuant to a judicial determination which is subject to review, there is an implied promise to restore it in case such determination be set aside, no superior equities intervening. That principle enables us to determine the just rights of all the parties concerned in this litigation, unless there is some matter not yet considered

which should prevent the excessive judgments from being reversed, and we know of none.

Counsel for appellants urge, with much earnestness, the rule that a person cannot be permitted to sue upon one cause of action and recover upon another; and that since the respondents sought to recover on the ground of fraud they must succeed on that ground or fail altogether. On that *Kruschke v. Stefan,* 83 Wis. 373, 53 N. W. 679, *Truesdell v. Bourke,* 145 N. Y. 612, 40 N. E. 83, *Eyre v. Potter,* 15 How. 42, and *Piper v. Hoard,* 107 N. Y. 67, 13 N. E. 632, are cited. The scope of those authorities, it seems, is misconceived by counsel. Their legitimate bearing was fully discussed here in *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55, in declaring the law respecting the scope of the power of amendment. This is not an action the subject matter of which would be wholly departed from if a recovery were sustained, eliminating the element of fraud. If it were an action to recover back money paid upon a contract, voidable and avoided for fraud, and the fraud failing it was sought to recover in some manner upon the contract, or if it were an action to recover possession of goods sold, the sale being repudiated on the ground of fraud, and, the fraud failing, it were sought to recover the purchase price of the property, the rule invoked by counsel would apply. This, however, is an action for the administration of a trust fund, in which certain parties were joined as defendants because of a claim that they were in possession of some of such funds which in justice they ought to account for. The fact that it is alleged that they obtained such possession through fraud, while it turns out that they did not possess themselves thereof through that means, yet have possession of a part of the trust property in fact, and are not justly entitled thereto, leaves them no less liable to restore the same because the element of fraud charged was not established. Such a variance is clearly within the power of amendment under the Code. Moreover, such a situation

is clearly within the rule in equity that if the plaintiff's cause of action as alleged be not established, but a liability within its broad scope is established, the matters in respect thereto being fully litigated, the plaintiff will not be turned out of court and compelled to seek for relief by means of another action, but the pending suit will be retained and as full relief be granted to the plaintiff as equity jurisdiction has power to afford. *Hebard v. Ashland Co.* 55 Wis. 145, 12 N. W. 437; *Prescott v. Everts*, 4 Wis. 314; *Hamilton v. Fond du Lac*, 25 Wis. 490.

Applying what has been said to the case before us, the request by Mr. Rust to have the compensation for his services as receiver and his expenses for legal assistance adjusted and paid, was a special proceeding, the arrangement of the parties being in effect the receiver, his counsel, and attorney upon the one side, and the general creditors upon the other. The order in his favor was appealable on the part of the creditors as persons aggrieved. Had they appealed and the order been reversed, his duty to restore if in the meantime he had applied the trust fund to his private use, is clear. The fact that the order was set aside in the court where it was granted, and the action in that regard sustained, is obviously governed by the same principles. The attorney, Mr. Frawley, and the counsel, Mr. Hayden, do not stand in the same situation as regards creditors. Their relations were with Mr. Rust as receiver. They had no relations with the creditors except one of an equitable character. Mr. Rust was primarily liable to them to the amount, at least, fixed by the court as a reasonable allowance for services of the kind which they performed. There being no express contract between them, they and Mr. Rust having joined in submitting the matter of the amount that should be paid to them to the court, they bound themselves by implied contract to take what should be judicially determined was proper to be paid them out of the trust fund. If the compensation had not been sat-

isfactory and they had brought suit against Mr. Rust, after what occurred, the order of the court would have been deemed part of the contract with Mr. Rust, and would have precluded them from any further recovery. Their only recourse, if they had any, in case of dissatisfaction with the order, was by appeal as parties aggrieved, upon the theory that they had an equitable lien upon the trust fund. *Walsh v. Raymond,* 58 Conn. 256, 20 Atl. 464; Gluck & Becker, Receivers, sec. 106. The contract between Mr. Hayden and Mr. Frawley and the receiver was conditional in this: that in case the allowance made by the supervising court should be subsequently reduced they would abide by the change, not holding Mr. Rust to a personal liability in case the money should not theretofore have been paid by him, and not holding the money to his loss in case the same should have been so paid. That, in principle, is very clearly laid down in the opinion of HALL, J., in the case above cited. Upon the same equitable principles that govern where a judgment has been reversed after payment has been enforced, payment by a receiver to his attorney under the circumstances of this case is presumed to be subject to the order not being disturbed by due course of law. If it is so disturbed by a reduction in the allowance, a cause of action accrues in favor of the receiver for a restoration of the excessive payment. The implied promise, upon equitable principles, dates from the time the money was paid, and interest should be figured from that date.

Applying the foregoing to the minor conclusions reached, the receiver is liable in this action for $524.26 and interest thereon at the rate of six per cent. per annum from the time he received the same, which is fairly fixed in the findings at July 30, 1895, this referring to the conclusion reached in Appeal No. 2. In addition, he having received from the trust fund $7,427.82 as compensation for his personal services, $11,144.02 on account of the legal services of T. F.

Frawley, and $4,952.02 on account of the legal services of his counsel, H. H. Hayden, in all $23,523.86, while he was entitled to receive but $5,000 for his personal services and $10,000 for expenses incurred by employing legal assistance, in all $15,000, his legal representatives are liable in this action to restore to the trust fund, at the suit of the respondents, $8,523.86, with interest from December 30, 1897, the time the excess was paid, less such sum as should be allowed for expenses of settling his account since December 30, 1897.

No proceedings outside of this action need be resorted to for the enforcement of the equities between the personal representatives of Mr. Rust and those of Mr. Frawley, and those of Mr. Hayden. Upon general principles of equity, and the statute, sec. 2883, Stats. 1898, as well, they can be finally adjusted in the decree to be entered herein under the directions of this court. The statute provides that:

"Judgment may be given for or against one or more of several defendants and it may determine the ultimate rights of the parties on each side, as between themselves, . . . and may grant to the defendant any affirmative relief to which he may be entitled."

It follows that Mr. Hayden having received from Mr. Rust $4,952.02 while he was entitled to receive but $2,500, his representatives are liable to the latter's representatives for the excess of $2,452.02 and interest thereon at the rate of six per cent. per annum from December 30, 1897, the day the same was paid.

Mr. T. F. Frawley, having received from Mr. Rust as receiver $11,144.02 while he was entitled to but $7,500, the former's legal representatives are liable to the latter's for the excess of $3,644.02 and interest thereon from the date the same was paid, December 30, 1897.

Complete equity between all these parties demands that the judgment in favor of the respondents, representing all the creditors participating in this litigation, entitled to the bene-

fit of the recovery against the legal representatives of R. E. Rust, shall be adjudged a lien on the recovery as to the legal representatives of H. H. Hayden, and also the recovery as to the legal representatives of T. F. Frawley, after applying on such recoveries the costs that may be allowed to such legal representatives respectively in the court below as hereafter directed.

Some additional compensation, under familiar principles, should be allowed to the receiver as expenses of passing his account, notwithstanding the manner adopted in doing so. While such manner placed the receiver in the position of a litigating defendant in the action, which, under the peculiar circumstances of this case, not liable to frequently occur we should hope, we hold was permissible in one view of it and approvable in another, the rights of the receiver, as regards compensation for the expenses of passing his account, to be paid out of the trust fund, of course cannot be prejudiced. If the conclusion was that there was any great fault upon the part of Mr. Rust leading to this new litigation, it would be competent for the court to deny him the usual compensation for expenses in passing the account; but it does not. Yet on the contrary the unfounded charges made against the receiver and his attorney and counsel, which have led to years of litigation since December 30, 1897, renders it eminently proper that the creditors represented by respondents should bear a considerable share of the expenses that would otherwise fall on Mr. Rust's estate. The case as to the abstract question involved is substantially the same as would have been presented to the judge who originally settled the account if he had set aside his order at the request of the creditors and gone over the entire matter anew, putting the receiver to a considerable expense in that regard. In such circumstances there would not be any question but that the reasonable expense of the receiver for attorney's and counsel's fees and other costs would be allowable to him, payable out of

the trust fund. Not only allowable, but it would be unjust not to allow the same. Now his rights in that regard are not changed by reason of the peculiar method resorted to for the accounting. So it seems that some reasonable amount, in view of all the circumstances, should be allowed, to be deducted from the liability above mentioned, on account of the additional expenses caused to the personal representatives of Mr. Rust by reason of the renewed controversy over his account. It further seems best that there should be no further litigation or proceedings in order to determine the proper amount. The case is all before us. It can be seen with reasonable certainty, as well here as anywhere, what sum should be allowed under all the circumstances. Many things are to be considered in fixing this new allowance,—many things not necessary to inscribe in this opinion. Of course, very much of the expense of this litigation was necessarily borne by other parties. Such expenses cannot be considered. The expenses of those who represented the receiver are so interwoven with those of other defendants, that it would be extremely difficult, if not impossible, to separate them with any degree of definiteness by any aid that could be given to this court or to the trial court, by sworn testimony or otherwise. The matter is of such a peculiar character that the best that can be done is to make an estimate of what the allowance should be, having regard to what was reasonably necessary as to the one particular interest in view of its being united with many others. Probably this court is as competent to do that after the investigation made here as any court can be, and, having power to do so, it is thought best not to leave anything open for further controversy. We have concluded to allow the personal representatives of Mr. Rust, as reasonable expenses of settling the receivership account, in proceedings that have taken place in respect thereto since December 30, 1897, the sum of $500 and all costs that might be taxable against them in this court and in the court below,

such sum to be deducted from the liability to the respondents hereinbefore mentioned.

The matter of costs in the court below should be settled by this decision so as to avoid any difficulty hereafter in that regard. Testing the record by sec. 2920, Stats. 1898, after eliminating the interest represented by the personal representatives of R. E. Rust, we have defendants united in interest in a general way, but substantially not so united, rendering it permissible, and under the circumstances proper, to allow separate bills of costs where separate answers were interposed, and directions will hereinafter be made in that regard. The rights of the defendants as to that may be restrained by the court to an amount below what might be taxed by the fee bill in the discretion of the court, or disallowed altogether if that should seem best in a case like this. Subd. 7, sec. 2918, Stats. 1898. We have concluded to name a sum which in our opinion will be equitable under all the circumstances as to each defendant or group of defendants entitled to a separate recovery for costs, putting the same at a figure which we have determined with certainty to be below the amount that might be taxed by the fee bill, thus doing away with the necessity for the taxation of costs in the court below, and at the same time awarding to each one of the defendants or group of defendants entitled to a separate bill of costs, an equitable amount.

On the principles above stated there will be awarded to the personal representatives of H. H. Hayden for costs in the court below, in the rendition of the final judgment, $250. To the personal representatives of D. R. Moon, and *Fitch Gilbert, George T. Thompson, John S. Owen,* and the *Chippewa Valley Bank,* as parties answering together, $250; and to the personal representatives of T. F. Frawley, who answered separately, $250. The supplemental and separate answer of the personal representatives of D. R. Moon is not deemed to have changed the situation of that interest as the

same became fixed by Mr. Moon's having joined with *Fitch Gilbert* and others in answering to the complaint during his lifetime.

We have next to consider the subject of costs to be awarded in this court. As heretofore suggested, no costs will be awarded here for or against the interests represented by the personal representatives of R. E. Rust. On the motion to dismiss the appeals, because of the peculiar wording of the notices by which they were taken, it seemed necessary to hold that the jurisdiction of this court to hear the matter as to each of the appealing defendants depended upon whether each had complied with sec. 3052, Stats. 1898, by giving an undertaking for $250; it being considered that, since all the appealing defendants having, as stated in the notices of appeal, "severally and separately" appealed, each, from the standpoint of sec. 3052, had pending in this court, so far as the notices of appeal could render it so, a separate appeal. But a different question arises as regards the number of prevailing parties, in determining whether there should be here separate bills of costs, and if so how many such bills. There may be, as it seems, several appeals under sec. 3052 in a case where several persons united in interest severally appeal, and yet such several appeals, when disposed of in this court, there being really but one interest represented by the several defendants so severally appealing, which interest prevails, have but one prevailing party under sec. 2949, which provides that, "Costs shall be allowed in the supreme court irrespective of any costs taxed in the case in the court below to the prevailing party," etc. The term "prevailing party" as used in that section evidently refers, not so much to the person as to the interest represented. The language of the statute is peculiar in this: it indicates that the costs are to go to the prevailing party, not to the prevailing person. The word "party" is used in a plural or singular sense according to the person or persons standing for the particular interest in-

volved. That is in harmony with the decision of this court in *Allis v. Meadow S. D. Co.* 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

Looking at the various groups of appealing defendants in the light of what we have said, it is considered that there must necessarily be, as regards the appellants, seven prevailing parties as follows:

1. *Chippewa Valley Bank* and *George T. Thompson.*

2. *Fitch Gilbert, John S. Owen,* and *S. G.* and *F. H. Moon* administrators with the will annexed of the estate of D. R. Moon, deceased.

3. *Fitch Gilbert* and *J. T. Barber.*

4. *Fitch Gilbert* and *George T. Thompson.*

5. *Fitch Gilbert.*

6. *John S. Owen.*

7. *Lydia A. Frawley,* executrix of the last will of T. F. Frawley, deceased, and *A. J. Marsh* and *Daniel McLeod,* executors of the last will of H. H. Hayden, deceased.

Directions must be given as regards the collection of these various bills of costs in this court as well as in the court below, to the end that all sums for costs which the respondents may be required to pay shall be reimbursed to them out of the trust fund created by the recovery against the personal representatives of R. E. Rust. This is deemed equitable because it seems that, notwithstanding the disastrous results to respondents, the proceedings for the reopening of the receivership account were instituted in good faith by the active creditors, and were subsequently carried on in good faith to the final result, and that all creditors not personally active in the matter allowed themselves to be represented by those who were. Such directions must be given in regard to this matter that the judgment in this court in favor of the appellants, and the judgments in the court below in their favor as well, will, until paid, constitute equitable liens upon the judgment that shall be rendered in favor of re-

spondents against the legal representatives of R. E. Rust, and that upon the payment of any such judgment by the former the same shall be regarded as kept alive in favor of the respondents paying the same, with the equitable lien aforesaid incident thereto, till fully discharged by the discharge of such equitable lien through the payment thereof to the respondents out of the trust fund. Such further directions must here be given as regards the recoveries for costs in the court below in favor of the legal representatives of H. H. Hayden and the legal representatives of T. F. Frawley respectively, that such recoveries shall be used, so far as the same will go, for that purpose, in reduction of the recoveries against them respectively in favor of the legal representatives of R. E. Rust.

Such further directions should be given as will, so far as practicable, render further controversy respecting any matter in this litigation, even as regards details of the closing according to our decision, unnecessary.

We might now rest from further labors upon writing the mandate of the court. It is believed that every question advanced by counsel upon either side, that could in any reasonable aspect of the case affect the final result, has been considered and our conclusion in respect thereto stated, with reasons therefor. Those that have not been treated directly, have been incidentally. Yet, because of the importance of the principles involved and the great length of this opinion, a brief recapitulation of the fundamental errors found may be helpful in understanding the decision, in future cases. However plain many of the principles found to have been violated may appear here, the fact that to the learned circuit judge and the eminent counsel for the respondents they seemed quite different, strongly suggests that nothing should be left undone which may reasonably be done that will fortify against a recurrence of such errors. The remediless consequences liable to flow from serious misconceptions of

legal principles are well illustrated here. It stimulates us to put up all the guards we reasonably can to avoid such happenings. This court can correct errors, and so far as human wisdom embodied in our laws has designed a standard for measuring, in money, injurious consequences of wrongs to person, character, or estate, can redress them or open the way therefor; but no vindication which this or any other human tribunal can afford can redress still other injuries which may weigh down men's souls in spite of any legal vindication. That situation is peculiarly impressive in this case when we note, as has been before indicated, that all the significant figures concerned, that were so condemned by the judgment appealed from, have passed from under the cloud only to cross the Dark River that is never recrossed, and must take such vindication as the court can afford at the hands of their legal representatives.

Here, as we view the matter, are the fundamental mistakes that were committed in this case:

1. In assuming that, because Mr. Hayden severed his connection with the insolvent corporation to be active in commencing the receivership action, an ulterior motive on his part was to be presumed, and that such conduct, in connection with other circumstances happening before such commencement, and others subsequent thereto not evidencing bad intent, warranted holding that prior to such commencement a fraudulent agreement was formed to misappropriate the assets of the insolvent, and viewing the transactions which thereafter occurred from that standpoint.

2. In finding, contrary to the undisputed evidence, that the receiver did not, prior to endeavor to save something out of the Ashville bonds by the use of his own means, obtain the court's refusal to allow him to use receivership money in the matter.

3. In finding, in effect, that the receiver realized a profit

from the Asheville matter, when the evidence was clear that he was a loser to a large amount.

4. In finding that the receiver fraudulently concealed the fact that $3,500 of Asheville bonds belonged to the trust fund, when the evidence is to the effect that there were but $2,500 of such bonds that he ever possessed or knew about, and is reasonably clear that the insolvent did not control the additional $1,000 of bonds after the day they were issued, if at all.

5. In assuming that, in a judicial administration of the property of an insolvent corporation for the benefit of its creditors, secured creditors have no standing as regards a distribution of the assets except upon a basis of their claims, less the value of their securities.

6. In assuming that a receiver, even with the approval of his court, cannot rightfully incur expense in the enforcement of contract liabilities in which he possesses only an equity, there being no reasonable ground to expect any money can be realized therefrom that will inure to the direct benefit of general creditors.

7. In assuming that, if a receiver incurs any expense in respect to any such equity without being so directed by his court, his action is necessarily wrongful and probably fraudulent.

8. In assuming that a receiver has no right, even with the approval of his court, to complete unfinished contracts of the insolvent where the amounts to be realized therefrom have been hypothecated, unless he has reasonable ground to expect something will be realized therefrom for the direct benefit of general creditors.

9. In assuming that legal services by the receiver's attorney, in collecting hypothecated accounts, must necessarily be deemed to have been rendered for the holders thereof.

10. In making such assumption notwithstanding the un-

disputed evidence that the services of the attorney were performed for the receiver.

11. In assuming that, in case of a receivership and the existence of hypothecations made by the insolvent before the commencement of the administration suit, the validity of which is not in dispute, the interests of the secured parties are adverse to those of general creditors, so that the attorney for the receiver, in performing any service for the former as to filing the proper proof in the receivership matter, of their claims against the insolvent, necessarily acts inconsistently with his employment by the receiver.

12. In assuming that an attorney for a receiver should keep an itemized account; not relying upon the court to make a proper allowance for his services at the close of the receivership.

13. In assuming, because the receiver's attorney made charges upon his books to his employer for some services rendered, they must represent the extent of his services; and that the compensation awarded him, so far as necessary to balance such charges, was necessarily fixed according thereto; and that all compensation awarded in excess of such charges, or of the reasonable value of such services, where the charges greatly exceeded it, was excessive and fraudulently obtained, though the undisputed evidence was that no attempt was made to keep a strict account of the services rendered, that the charges were not made with a view to obtaining compensation according thereto, and that they were never presented or intended to be presented to the court.

14. In assuming that a pledge of real property as security, not constituting a mortgage at law, is of no validity and cannot form a sufficient consideration for a valid mortgage carrying out the intention of the parties to the pledge, the property in the meantime having become impressed with a trust for general creditors.

15. In predicating findings against defendants upon un-

sworn statements of their agent respecting matters outside the scope of his agency.

16. In violating the rule that the fair testimony of an interested witness, not impaired by any other testimony or circumstance, should be deemed controlling.

17. In assuming that a reference of a receiver's account to take evidence in respect thereto and report the same with conclusions for the assistance of the presiding judge in settling such account, is governed by the statute and rules of court in respect to trials of actions before referees.

There are very many other errors which have been treated, but those specially mentioned caused the court below to view the conduct of the parties charged from a radically erroneous standpoint. Looking through such a veil of misconceptions, very many of the ordinary transactions that must necessarily occur in the judicial administration of a large property, of the character of the one in question, were supposed to be glaring evidences of fraud.

Now we will close this case, satisfied that justice will be done so far as it is given to us here to discover it. Satisfied, too, that no greater wrong appears anywhere in the record upon appellants' part than negligence at one or two points, and some indiscretion in the proceedings of December 30, 1897. We have been able to discover nothing that should reflect upon the professional, the business, or the official integrity of any one concerned in this litigation; nothing to indicate bad faith in the conduct of any one concerned with the receivership, nor to indicate but that the proceedings on the part of the creditors and those acting for them since December 30, 1897, have been characterized by the utmost good faith. The judgment pronounced will be shaped in harmony with that view. It is hoped that we may be able to so plainly direct the course to be taken in such proceedings as may be necessary to close up this matter, that neither party will need to make any further application to this court.

The deaths of Mr. Hayden, Mr. Frawley and Mr. W. A. Rust, the latter being one of the executors, as indicated, of the last will of Ralph E. Rust, having occurred since the cause was removed to this court, and due proceedings having been taken to continue the action notwithstanding, by the substitution, for Mr. Hayden, of *A. J. Marsh* and *Daniel McLeod* in their capacity as executors of his last will, the substitution, for Mr. Frawley, of *Lydia A. Frawley* in her capacity as executrix of his last will, and the substitution of *T. W. Gilchrist* as executor of the last will of Ralph E. Rust in place of W. A. Rust, deceased,—the judgments here and in the court below will be pronounced, using the names of the existing legal representatives of deceased parties.

By the Court.—Those parts of the judgment appealed from by the several appellants are reversed, that is to say:

1. That against *John S. Owen* for $182.94.

2. That against *Fitch Gilbert* for $119.58.

3. That against *Fitch Gilbert, George T. Thompson,* and William A. and *Aloney J. Rust* as executors of the last will of Ralph E. Rust, deceased, for $13,400.36.

4. That against *Fitch Gilbert, John S. Owen,* William A. and *Aloney J. Rust* as executors as aforesaid, and *Simon G.* and *Frank H. Moon* as administrators with the will annexed of the estate of D. R. Moon, deceased, for $3,536.02.

5. That against the *Chippewa Valley Bank, George T. Thompson,* and W. A. and *Aloney J. Rust* as executors aforesaid, for $891.50.

6. That against *Fitch Gilbert* and *James T. Barber,* and William A. and *Aloney J. Rust* as executors, as aforesaid, for $1,196.68.

7. That against the *Chippewa Valley Bank* and William A. and *Aloney J. Rust* as executors aforesaid, for $226.54.

8. That against William A. and *Aloney J. Rust* as executors aforesaid, for $1,395.67.

9. That against T. F. Frawley, H. H. Hayden and W. A. and *Aloney J. Rust* as executors aforesaid, for $29,071.91.

10. That against all the parties named for $798.91 costs.

11. That vacating the *ex parte* orders entered prior to December 31, 1897, except those of December 30, 1897, and the one authorizing the charging off of the account against the receiver and others, of $524.26.

12. That modifying the receiver's account as settled by the order of December 30, 1897, except as the account so originally settled is modified by this decision.

13. All other portions of the judgment inconsistent with those above specially mentioned.

The circuit court from which the cause was removed to this court is directed, immediately upon the return of the record to that court, and upon due application therefor, to enter an amended judgment containing that portion of the judgment as at first entered, not disturbed by this decision, and the following:

1. Awarding to the plaintiffs against *T. W. Gilchrist* and *A. J. Rust* as executors of the last will of Ralph E. Rust, deceased, judgment for $9,048.12 with interest at the rate of six per cent. per annum on $524.26 from July 30, 1895, and on $8,523.86 from December 30, 1897, to the date of this decision, April 19, 1904,—less the sum of $500, allowed in addition to costs that might be taxed as regards the receivership interest, for expenses incurred by that interest in the adjustment of the receivership account since December 30, 1897, and less the further sum of $500 applied to the payment of costs allowed to the legal representatives of H. H. Hayden and those of T. F. Frawley, and paid by deducting the same from the liabilities of said legal representatives to the legal representatives of Ralph E. Rust,—leaving the total sum to be recovered by the plaintiffs against the legal representatives of Ralph E. Rust, as of the 19th day of April, 1904, $11,634.32.

2. Awarding to *T. W. Gilchrist* and *Aloney J. Rust,* defendants, in their capacity as legal representatives aforesaid, against *A. J. Marsh* and *Daniel McLeod,* in their capacity as executors of the last will of H. H. Hayden, deceased, judgment for $2,452.02, with interest thereon at the rate of six per cent, per annum from December 30, 1897, to the date of this decision aforesaid, less $250 allowed to the Hayden interest for costs against the plaintiffs, making the total sum of $3,153.82.

3. Awarding to *T. W. Gilchrist* and *Aloney J. Rust,* defendants, in their capacity as executors aforesaid, against *Lydia A. Frawley,* defendant, as executrix of the last will of T. F. Frawley, deceased, judgment for $3,644.02, with interest thereon from December 30, 1897, at the rate of six per cent. per annum, to the date of this decision, as aforesaid, less $250 allowed to the Frawley interest against the plaintiffs for costs, making $4,807.48.

4. Awarding to *Lydia A. Frawley,* defendant, in her capacity as executrix, aforesaid, against the plaintiffs, judgment for $250 as costs in the circuit court, the same to be deemed discharged as soon as entered, by the credit of $250 to such interest as between the legal representatives of T. F. Frawley and the legal representatives of Ralph E. Rust, and a like credit to the latter as between them and the plaintiffs, as heretofore indicated.

5. Awarding to *A. J. Marsh* and *Daniel McLeod,* defendants, in their capacity as executors aforesaid, a judgment for $250 costs in the circuit court against the plaintiffs, the same to be deemed canceled as soon as rendered, by the credit of $250 given to such executors as between themselves and the legal representatives of Ralph E. Rust, deceased, and a credit of a like amount to the latter as between them and the plaintiffs as before indicated.

6. Awarding to defendants *Fitch Gilbert, John S. Owen,*

and *Simon G.* and *Frank H. Moon* as administrators with the will annexed of the estate of D. R. Moon, deceased, *George T. Thompson,* and the *Chippewa Valley Bank,* against the plaintiffs, $250 as costs.

7. Providing that the judgment, in the whole, shall be deemed entered as of the date of this decision, April 19, 1904, aforesaid, to the end that interest on the recoveries shall run from that time.

8. Providing that the recovery for costs in favor of *Fitch Gilbert* and his associates in the circuit court, and all judgments for costs rendered against the respondents in this court, shall be liens on the judgment in their favor as plaintiffs in the circuit court, against the legal representatives of Ralph E. Rust, deceased, such liens to continue till such judgments for costs shall have been paid to the judgment creditors respectively, and, if paid by the plaintiffs, till they shall have been reimbursed for their outlay in that regard out of the proceeds of the encumbered judgment in their favor.

No costs are to be taxed against the legal representatives of Ralph E. Rust in the circuit court,—any sum which might be equitably, under ordinary conditions, taxable against them, to be deemed offset by legitimate claims for expenses of settling the receivership account in addition to the $500 awarded as aforesaid.

Separate judgments for costs are awarded in this court to the appellants against the respondents as follows:

1. *Chippewa Valley Bank* and *George T. Thompson;*

2. *Fitch Gilbert, John S. Owen,* and *Sumner G.* and *Frank H. Moon* as administrators with the will annexed of the estate of D. R. Moon, deceased;

3. *Fitch Gilbert* and *James T. Barber;*

4. *Fitch Gilbert* and *George T. Thompson;*

5. *Fitch Gilbert;*

6. *John S. Owen;*

7. *Lydia A. Frawley* as executrix of the last will of T. F. Frawley, deceased, and *A. J. Marsh* and *Daniel McLeod,* as executors of the last will of H. H. Hayden, deceased;—

Each of said several prevailing parties, seven in number, to have taxed in his or their favor attorney's fees and one eighth of a full bill of costs exclusive of fees taxable under sec. 2949, Stats. 1898.

The respondents moved for a rehearing as to each of the separate appeals. The following opinion was filed June 10, 1904:

MARSHALL, J. No new question is presented now for consideration, or reason given why the result heretofore reached is not right, that has not been thought of and disapproved.

We are urged to at least make such modification of the mandate as to direct the trial court "to allow to the active creditors reimbursement out of the proceeds of the judgment rendered in their favor for all reasonable expenses which may have been incurred in the prosecution of these proceedings which have resulted in the obtaining of such judgment." That is a subject not necessarily involved in the decision of any question raised by the appeal. Just how a trust fund, brought under the control of a trial court by the execution of a judgment rendered pursuant to a mandate of this court, shall be administered for the benefit of those entitled thereto, is not ordinarily made a part of the decision here. Ordinarily the mere execution of any judgment in the trial court rendered pursuant to the mandate of this court is within the administrative function of the former, subject to review here in case of error; though it is proper to suggest, or in some circumstances to direct, what course shall be pursued. Probably a direction in the matter suggested by counsel for respondents in addition to what is contained in the former mandate, may expedite the speedy distribution of the trust

fund and final closing up of the whole matter, which is "a consummation devoutly to be wished." Such mandate may be considered amended so as to direct that the judgment to be rendered in respondents' favor shall provide that the recovery of the legal representatives of R. E. Rust shall be *into the hands of the clerk of the circuit court* for the benefit of all the creditors whose claims are established by the judgment, after the extinguishment of the liens for costs thereon and the payment of the counsel fees and other expenses of the active creditors in recovering and administering the fund, so far as the same are deemed reasonable, the amount for such counsel fees and expenses to be fixed and allowed at $1,000; that the residue left after the extinguishment of such lien and the payment of such $1,000 shall be under the direction of the court paid *pro rata* to all the creditors whose claims are established as aforesaid.

A mere review of the decision of December 30, 1897, as to the compensation and expenses of the receiver, could doubtless have been secured by a small outlay as compared with the large amount required to pay all the expense incurred by the necessity created by respondents of trying the multitude of issues presented to the court for adjudication which have been found, in the main, to be without merit as regards their contentions.

By the Court.—The former mandate is amended as above indicated, and the several motions for a rehearing are denied with $25 costs in favor of each prevailing appellant mentioned in the former opinion.

ARNOLD, Appellant, vs. RANDALL, imp., Respondent.

January 13—April 19, 1904.

Deeds: Taking title in name of third person: Assumption of mortgage by grantee: Liability of real purchasers: Trusts.

1. An agreement by the purchaser of land to assume and pay a mortgage thereon given by the vendor must, in order to be valid, be express. It cannot arise from any mere implication or legal imputation.
2. At the request of the purchasers of land, it was conveyed by the vendor to a third person, and by the terms of the deed the grantee assumed a mortgage on the land as a part of the purchase price. Said grantee, in fact, took title merely as an accommodation to the real purchasers, and afterwards conveyed to another at their request. There being no evidence of an express promise by such purchasers to pay the mortgage debt, there could be no implied promise upon which the mortgagee could sue. Their implied promise, if any, would be merely to pay the purchase price to the vendor.
3. Under sec. 2077, Stats. 1898, providing that no trust results in such a case, but that absolute title vests in the grantee except as against creditors, the purchasers cannot be held to be the real grantees so as to be bound by the declaration in the deed that the *grantee* assumed the mortgage.
4. Upon a conveyance of land to a trustee, not naming the beneficiaries, but vesting the legal title in him, the beneficiaries are not liable for any part of the purchase price upon the trustee's promise to pay.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

In 1895 one Gray traded real estate with one Bird. The latter deeded the premises conveyed by him, at the request of Gray, to one Grady, inserting in the deed the usual exception from covenants of warranty of an existing mortgage of $1,500, as to which it was declared, "Which the second party assumes as part of the purchase price." The taking of title by Grady was as an accommodation to Gray, and the land was afterwards conveyed by Grady to another at Gray's request. The claim of the plaintiff is that at this time Gray

promised Bird, as a part of the consideration of transfer, that he and the respondent *Byron T. Randall,* who was interested with him in the transfer, would assume and pay the $1,500 mortgage. The mortgage in question was executed by Bird and wife to one William Schimmel. The latter commenced foreclosure of that mortgage a few months afterward against Bird and wife. On July 6, 1896, judgment was rendered for foreclosure, and directing personal judgment for deficiency against Jennie C. Bird and Charles H. Bird. A foreclosure and sale was had in October, 1897, the net proceeds of which above costs were $310.24. Upon report of that sale personal judgment was entered against Jennie C. Bird and Charles H. Bird for $1,682.78 on November 9, 1897. On November 28, 1899, William Schimmel, the plaintiff, executed a formal assignment, whereby he sold, assigned, and set over the said judgment, "and all claims and choses in action against said parties," to one Rudolph W. Schimmel. On September 14, 1900, Rudolph Schimmel, in consideration of the sum of $350, which was in fact paid him, executed, under seal, a satisfaction piece in which he declared that "I do hereby acknowledge payment and satisfaction of and do hereby release said defendants Jennie C. Bird and Charles H. Bird from said judgments." On March 26, 1901, Rudolph W. Schimmel executed, under seal, an instrument whereby he declared that he did thereby sell, assign, and set over unto *Mette L. Arnold* the indebtedness and deficiency existing and certain promissory notes made by Jennie C. Bird and Charles H. Bird (the mortgage notes), "and also the assumption and liability thereon of Thomas Grady and *Byron T. Randall* and Thomas Gray, and the deficiency judgment from them after such foreclosure." In 1896 William Schimmel had sued Grady upon his assumption of this indebtedness, and realized out of certain attached property $103.45.

The present action is at law, alleging that the purchasers

of the mortgaged premises from Bird were Gray and *Randall,* that said purchasers expressly assumed and agreed to pay the mortgage indebtedness, and demanding recovery of the amount due. The court found substantially the facts above stated, and also that Gray, acting for himself and *Randall,* made this trade; that the deed to Grady was for them, and without his knowledge and consent, except that he had generally consented that his name might be used for such purposes; that Gray agreed that the purchasers would, as part of the consideration, assume the payment of said mortgage indebtedness, and that Thomas Gray, on his own behalf and on behalf of said *Byron T. Randall,* as part consideration, assumed the payment of said mortgage and taxes; that *Randall* never personally made any promise to pay it, but that he received into his possession the deed running to Grady, with knowledge of its contents.

As conclusions of law the court found that Gray and *Randall* became personally liable for the mortgage indebtedness, but that the release and satisfaction executed by Rudolph W. Schimmel was effective to release the entire judgment and the indebtedness evidenced thereby, not only as against Bird, but as against all others liable for the same indebtedness. Accordingly judgment dismissing the complaint was entered, from which the plaintiff brings this appeal.

The cause was submitted for the appellant on the briefs of *Arnold & Arnold* and *Wm. M. Steele.*

A. C. Titus, for the respondent.

The following opinion was filed February 2, 1904:

DODGE, J. The conclusion of the trial court that the written and sealed satisfaction of the judgment against Mr. and Mrs. Bird released any liability for the same debt resting upon Gray and *Randall* is vehemently assailed, and we confess to much doubt whether it could be sustained. If Gray and *Randall* had validly assumed that indebtedness, they had

become the principal debtors, and Mr. and Mrs. Bird mere sureties. *Stites v. Thompson,* 98 Wis. 329, 73 N. W. 744. That the release of a surety upon only partial payment discharges the entire debt as against the principal is a proposition which, to say the best for it, is involved in too much doubt to be readily accepted. We shall not, however, deem necessary decision of such question, for we have reached the conclusion that the judgment is right on other grounds.

The court has found, in effect, that Gray was agent for appellant, *Randall;* that they together were the "purchasers" of the mortgaged premises from Bird, and that Grady had no interest in or relation to it except that the land was conveyed to him in name, pursuent to a custom of Gray's to which he had assented, it being tacitly understood that he would convey the land at Gray's request. To this extent we shall find it unnecessary to question the findings, though quite vigorously assailed by respondents. All this, however, would not support any conclusion of law that *Randall* had agreed to pay Bird's mortgage debt to William Schimmel. Such agreement, to be valid, must have been express. It could not arise from any mere implication or legal imputation. *Tanguay v. Felthousen,* 45 Wis. 30; *Electric A. Co. v. United States F. & G. Co.* 110 Wis. 434, 85 N. W. 648. But the court found ostensibly as a fact that "Gray, on his own behalf and on behalf of said *Byron T. Randall,* as part of the consideration, assumed the payment of said mortgage and taxes." This finding, if it means that Gray in express words so agreed, might well support *Randall's* liability, the agency being established. The respondents, however, challenge this finding by an exception, and have brought up all the evidence by bill of exceptions. Examination of that evidence discloses that only Gray and Charles H. Bird were in any wise connected with the making of the bargain or testify with reference to it. Nowhere in the testimony of either is any statement made that Gray at any time said that he or he and

Randall would assume. The nearest approach thereto is the statement of Bird that he told Gray that the mortgage must be assumed. He does not say by whom, but in that connection declares that he insisted on having an agreement to assume put in the deed, and that he either wrote it in himself or had it done at his direction. The only time he attempts to state the person who was to assume he describes him as the "grantee" in the deed. He also declares that he knew whom the deed was to run to, namely, Grady, and he made some inquiry as to Grady's responsibility. Neither of these two witnesses, though evidently favoring the plaintiff to the utmost, suggest any understanding that Gray made any promise, or that either had any understanding, that any one except the grantee in the deed, Grady, was to assume this debt. Of course, if Bird chose to be satisfied with an assumption by Grady, or even if he was induced to be so satisfied by concealment of the true purchaser, or even by fraud, the mortgagee, Schimmel, or his assigns, could have no ground of complaint. He was no party to the transaction, and his situation was in no wise changed in reliance upon it. He is the merely accidental beneficiary of whatever agreement Bird did in fact make. We can find no evidence of any agreement for payment of this mortgage debt, except that written in the deed, to the effect that Grady should do so. Plaintiff's assignor has adopted that agreement, sued and recovered judgment against Grady, and collected from him at least in part.

But, indeed, the appellant does not attempt to point us to any specific word of evidence that Gray, either on behalf of himself alone or conjoined with *Randall,* made any express promise to pay this mortgage debt, although he does assert generally that the finding is supported by the evidence. The burden of his argument is cast upon the contention that, because the grantee, Grady, was a mere nominal party, the real parties in interest must be held liable upon the duty of payment assumed by him. The grounds of this contention are

not very clear, but one of them seems to be that the real purchaser of an article is liable for the purchase price when he is discovered, though no promise to pay it has been expressly made on his behalf; citing *Coverly & Co. v. Braynard,* 28 Vt. 739. Let this be conceded, and it does not help the plaintiff. If such real purchaser is liable, he is so only upon a promise implied by law, and that promise would be merely to pay the purchase price to the seller. It is upon that principle that this court has held so definitely that there can be no implication of any promise to pay to a third person such as to enable that person to sue directly upon it.

Appellant also urges that, although the only contract was that in the deed, namely, that the *grantee* should assume the mortgage debt, still Gray and *Randall* must be liable, for they were the real grantees. But were they? Counsel cites to us *Connor v. Jones* (S. D.) 72 N. W. 463, which supports both the premise and the conclusion. That case, however, rests upon a statute diametrically different from our own. Sec. 3708, S. Dak. Stats. (1901), provides that upon conveyance to one upon consideration paid by another a trust is presumed in favor of the latter, which, by virtue of other sections, is at once executed, so that the latter becomes vested with the legal title, and may very properly be designated the real grantee in the deed itself. Quite otherwise in Wisconsin, where, by virtue of sec. 2077, Stats. 1898, no trust results under like circumstances, but absolute title vests in the grantee named, except against creditors. Under our statutes neither Gray nor *Randall* acquired anything by the deed to Grady. He became the absolute owner, to do as he pleased with the land. If they ever acquired it, they must do so by contract with him, and upon such terms as he should fix. It rested with him to insist on their assuming the burden of the mortgage debt or dispensing with such assumption when he conveyed at their request, if, indeed, he so conveyed at all. For this reason the South Dakota case is no authority for

appellant's assumption that *Randall* and Gray were the real grantees in the deed to Grady. On the contrary, we deem it entirely plain that they were not. Apart from that consideration, however, their liability for any of the purchase price for property conveyed to a trustee for them upon the trustee's promise to pay is negatived by *Gates v. Avery,* 112 Wis. 271, 87 N. W. 1091, which we deem conclusive against this branch of appellant's argument.

We are therefore constrained to the conclusion that the trial court's finding that Gray or *Randall* assumed and agreed to pay Schimmel's mortgage, as a finding of fact, is wholly unsupported by any evidence, and as a conclusion of law from facts which did exist is unwarranted and erroneous. Hence judgment dismissing the complaint was correct.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied April 19, 1904.

MILWAUKEE TRUST COMPANY and another, Respondents, vs. SHERWIN and another, Interveners, Appellants.

January 14—April 19, 1904.

Appeal: Orders: Insufficient return: Corrections, when permitted.

1. On appeal from an order reciting that it was based on affidavits of numerous persons the return of the clerk merely certified that the papers returned were "all the papers filed" in the action. *Held,* that this was insufficient, under sec. 3050, Stats. 1898, to give the supreme court jurisdiction, and the appeal must be dismissed.
2. While the supreme court has power to permit necessary corrections in the appellate procedure after notice of appeal duly given, although the record filed is not such as to give it jurisdiction to decide the merits, and while it will pursue a general policy of liberality in that regard, yet such corrections will be permitted only in furtherance of justice, considering the effect on both parties, and when the mistakes or omissions to be corrected are excusable.

APPEAL from an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Dismissed.*

Appeal by *Sherwin* and another, holders of bonds secured by the foreclosed mortgage, from an order confirming a foreclosure sale and denying appellants' motion to order a resale.

For the appellants there was a brief by *McCabe & Dahlman,* and oral argument by *A. L. Dahlman.*

For respondent *Mariner* there was a brief by *Ryan, Merton & Newbury,* and oral argument by *E. Merton.*

George P. Miller, for the *Milwaukee Trust Company.*

The following opinion was filed February 2, 1904:

DODGE, J. The order appealed from recites that it is based on the affidavit of Richard C. Sherwin and on affidavits of Camp, *Mariner,* and Van Dyke in reply, and on "affidavit of numerous persons" as to value. The return of the clerk merely certifies that the mass of papers returned are "all the papers filed in the above-entitled action." In neither nor both of these assertions is there anything to identify any of the papers as the ones used upon the application for the order, nor to declare that the entire bundle includes all those so used. This is necessary to our jurisdiction, under sec. 3050, Stats. 1898. In its absence the appeal must be dismissed. *Glover v. Wells & M. G. Co.* 93 Wis. 13, 15, 66 N. W. 799; *Tenney v. Madison,* 99 Wis. 539, 75 N. W. 979; *Madden v. Kinney,* 114 Wis. 528, 90 N. W. 449.

By the Court.—Appeal dismissed.

The appellants moved for a rehearing, and the following opinion was filed April 19, 1904:

DODGE, J. Appellants move for a rehearing and modification of the mandate so as to permit them to correct their omission and file a properly certified record complying with sec. 3050, Stats. 1898. That we have power to permit necessary

corrections in the appellate procedure after notice of appeal duly given, although the record filed is not such as to give us jurisdiction to decide the merits, we have no doubt. Sec. 3068, Stats. 1898; *Tyson v. Tyson,* 94 Wis. 225, 68 N. W. 1015; *Johnston v. N. W. L. S. Ins. Co.* 107 Wis. 337, 83 N. W. 641. A general policy of liberality in relieving from mistakes and omissions is undoubtedly indicated by such statutes as secs. 2829, 2830, 3068, Stats. 1898, but only in furtherance of justice, considering the effect on both parties, and when such mistakes are excusable. The court should not extend favors to those who negligently and without cause consume the time and labor which it owes to other duties, nor if the mistake or omission or the rectification thereof be substantially prejudicial to the other party. At a time not very remote, when the accumulated business of this court was such that serious delays to litigants were threatened, it became imperative that its attention should be refused to those who failed to bring their causes before it, in accordance with law and rules, in such form that easy and certain apprehension of merits was possible, in order that its utmost exertions might be devoted to litigants not so in fault. To this end it was found necessary to apply with considerable strictness the penalty of dismissal or other drastic rejection of hearing upon merits to cases brought here in noncompliance with sec. 3050 and Rule VII½. Thanks to the diligence and vigor of the members of this court (before the writer became such), the accumulated arrearage was cleared off, and we may now confidently hope that no recurrence thereof is imminent. As it has become possible, we have attempted to relax the former strictness in the presence of mere curable defects in procedure in cases where it appeared reasonably probable that there were merits in favor of the party in default, and to pursue a policy of effort to reach the merits of each case notwithstanding imperfections in the appellate procedure, provided such imperfections were excusable and could be reme-

died without injury to the rights of the innocent party. This has been done without any special declaration of change of policy, and perhaps, in cases like this, where the only decision announced has been that of dismissal, parties have assumed that our examination had been limited to the grounds for such action.

In deciding the present case originally, we did not stop with mere ascertainment of the absence of any sufficient certificate to give jurisdiction. We examined all the papers sent here, and were convinced that, even if properly certified to have been used upon the motion, there was no probability that we should be able to reverse the conclusions of fact deduced therefrom by the trial court, or convict it of abuse of discretion. Hence it appeared to us that there would be nothing promotive of justice in permitting appellants to attempt to show excuse for the mistake in the certification, while injury and expense to respondent must obviously result from any such attempt and the resulting delay of finality in the order appealed from. We find nothing in appellants' motion to change that conclusion.

While we purpose continuance of a general policy of liberality, as above indicated, of course we must not be understood as inviting laxity in practice. An offender against statutes or rules governing procedure will be spared the extreme penalty of the disobedience only upon terms which will protect his innocent opponent as far as possible from delay, expense, or injury, and which will, we hope, discourage further offenses.

By the Court.—Motion for rehearing denied, with twenty-five dollars costs.

THE STATE, Respondent, vs. ZILLMANN, Appellant.

February 5—April 19, 1904.

Forfeitures: Pleading: Taxation: Board of review: Intentional omission of property: Meetings: Directory statute: Constitutional law.

1. In a civil action to recover a forfeiture the pleadings are to be construed liberally.
2. The word "intentionally," in sec. 5, ch. 379, Laws of 1901 (imposing a forfeiture upon any member of a board of review who "shall intentionally omit or agree to omit from assessment any property liable to taxation," etc.), imports wilfulness, evil intent, or unlawful purpose; and a complaint for recovery of such a forfeiture, charging the fact in the language of the statute, need not allege in terms that the property was unlawfully, wilfully, or corruptly omitted.
3. An allegation, in such a complaint, that the property omitted was then and there liable to taxation in the assessment district of which defendant was an officer, is sufficient, without further specifically alleging that it was so liable to taxation on the 1st of May in that year as provided in sec. 1033, Stats. 1898.
4. An allegation that defendant "as member of said board of review" did intentionally omit, etc., sufficiently alleges that he acted in his official capacity.
5. Failure to describe specifically the property omitted, does not render the complaint insufficient, but can be taken advantage of, if at all, only by motion to make more definite and certain.
6. Sec. 1060, Stats. 1898, requiring the board of review to meet on the last Monday in June, and sec. 1064, providing that the assessor shall deliver the completed assessment roll to the clerk on or before the first Monday in August, are directory only, and a failure to comply literally therewith does not invalidate the action of such officers unless the rights of persons interested are thereby materially affected to their prejudice.
7. An act (sec. 5, ch. 379, Laws of 1901) imposing a penalty upon any member of a board of review who shall intentionally omit to perform official duties imposed upon him by law, does not contravene any constitutional provision or violate public justice.

APPEAL from an order of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This is an action to recover a penalty under ch. 379, Laws of 1901. The complaint alleges that the defendant is indebted to the plaintiff in the sum of $250 under sec. 5 of said chapter; that the defendant at the time was president of the village, and a member of the board of review of the assessment district of the village of Thorp, in Clark county. As to the particular delinquency, the complaint charges:

"That on the 24th day of August, in the year 1903, the defendant herein named, and J. B. Bachman, village clerk, and Max Weber, assessor of said village of Thorp, each being members of said board of review by virtue of being respectively clerk and assessor of said village of Thorp, did meet and organize and act as a board of review in and for the assessment district comprising the said village of Thorp; and the aforesaid Max Weber, the assessor of said district, comprising the said village of Thorp aforesaid, did then and there lay before said board of review his assessment roll of real property, and all the sworn statements made by others, and valuations made by him, the said assessor, of personal property and bank stock.

"That the said defendant, as member of said board of review in said assessment district, did then and there intentionally omit, and did then and there intentionally agree with the said J. B. Bachman, village clerk, as member of said board of review, to omit, from assessment a large amount of personal property, amounting in value, as appeared from said sworn statements and assessment roll of said assessor, to the sum of eight thousand six hundred and seventy-five dollars ($8,675), all of which property was then and there liable to taxation in said assessment district comprising the said village of Thorp."

Judgment is demanded for the amount of the penalty.

Defendant demurred to the complaint on the ground, among others, that it does not state facts sufficient to constitute a cause of action. The defendant appealed from the order overruling the demurrer.

For the appellant there was a brief by *R. J. MacBride* and *Geo. L. Jacques,* and oral argument by *Mr. MacBride.* They contended, *inter alia,* that the duties of the board of review are judicial in their nature; and if sec. 5, ch. 379, Laws of 1901, be so construed as to impose a penalty upon a member of such board for acts done in the discharge of such duties and within his jurisdiction, it contravenes sec. 22, art. I, Const., is contrary to the spirit of the whole constitution, and contrary to public justice. *Steele v. Dunham,* 26 Wis. 393. The same immunity from prosecution or action on account of their judicial acts which has been given to judges and juries of courts has always been extended to inferior officers in the performance of judicial duties, provided their acts were within their jurisdiction. *Wilson v. New York,* 1 Denio, 595; *Weaver v. Devendorf,* 3 Denio, 117–120; *Keeler v. Woodward,* 3 Pin. 306; *Druecker v. Salomon,* 21 Wis. 621; *Steele v. Dunham,* 26 Wis. 393; *Smith v. Gould,* 61 Wis. 31; *Fath v. Koeppel,* 72 Wis. 289; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 258; *Barhyte v. Shepherd,* 35 N. Y. 238; *Meade v. Haines,* 81 Mich. 261. This rule applies to taxing officers. *Stewart v. Case,* 53 Minn. 62, 54 N. W. 938.

For the respondent there was a brief by the *Attorney General* and *L. H. Bancroft,* first assistant attorney general, and oral argument by the *Attorney General.*

The following opinion was filed February 23, 1904:

SIEBECKER, J. Sec. 3295, Stats. 1898, provides that, in an action to recover forfeitures:

"It shall be sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, according to the provisions of the statute which imposes it, specifying the section and chapter containing such statute. And when such section imposes a forfeiture for several offenses or delinquencies it shall specify

the particular offense or delinquency for which the action was brought, with a demand for judgment for the amount of such forfeiture."

The complaint contains a plain and concise statement of the facts, charging that defendant is indebted to the plaintiff in the amount of the forfeiture, under the provision of the law which imposes it, and specifying the chapter and section of such statute, as well as the particular offense or delinquency for which the action was brought, with a demand for judgment. It is argued that greater strictness of construction should be applied than in ordinary cases, because the recovery sought to be enforced is penal in its nature. It has, however, been determined that the proceeding is a civil action, and that the pleadings are therefore to be construed liberally to meet the ends of justice between the parties. *Teetshorn v. Hull,* 30 Wis. 162; *State v. Smith,* 52 Wis. 134, 8 N. W. 870; *Chafin v. Waukesha Co.* 62 Wis. 463, 22 N. W. 732. Counsel nevertheless lays stress in support of this contention on the utterance of the court in *State v. Citizens' Ins. Co.* 71 Wis. 411, 37 N. W. 348, where it is stated that in an action for a penalty every fact necessary to show that it has been incurred must be stated, and that no rule of liberal construction will dispense with the necessity of stating every fact that creates the liability. It is required in all civil cases that the facts necessary to constitute the cause of action be alleged, but this requirement in no way changes the rule that pleadings should be liberally construed in such actions. Testing the pleading as a complaint in a civil action, is it sufficient to meet the requirements of the statutes in an action for the recovery of a forfeiture under ch. 379, Laws of 1901? Appellant contends that it fails in several particulars, which will be noticed.

One objection to the complaint is that it does not allege that the personal property was unlawfully, wilfully, and corruptly omitted from assessment, or so omitted without taking

evidence on the subject. The complaint does allege, in the language of the statute, that the defendant "did . . . intentionally omit and did . . . intentionally agree with [others]," etc., " . . . to omit from assessment, a large amount of personal property, . . . all of which property was then and there liable to taxation," etc. These allegations in the language of the statute are sufficient, unless, as claimed, the language of the statute is so indefinite, obscure, and uncertain that the statute fails to define what acts shall be deemed an offense and subject the offender to the penalty prescribed. The legislative intent seems clear and certain when the language employed is given its ordinary signification. The statute, so far as applicable to the case before us, provides that:

"Any member of a board of review of any assessment district who shall intentionally omit or agree to omit from assessment any property liable to taxation in such assessment district or shall otherwise intentionally violate or fail to perform any duty imposed upon him by law . . . shall forfeit" a certain sum of money. Sec. 5, ch. 379, Laws of 1901.

The fair inference from these terms and provisions is that any member of a board of review shall be liable to the forfeiture for unlawfully omitting or agreeing to omit from assessment property liable to taxation. This interpretation harmonizes with the meaning usually applied to the word "intentionally" when used in penal laws, namely, that it imports wilfulness, evil intent, or unlawful purpose.

It is claimed the complaint is insufficient, in that it fails to allege specifically that the property was liable to taxation in the district May 1, 1903, as required under sec. 1033, Stats. 1898. The complaint alleges that the property specified was liable to taxation in the assessment district of which defendant was an officer. Giving this allegation the reasonable intendment applicable to pleading, and applying it to the statute which provides that all personal property liable

to taxation in each assessment district shall be assessed as of the 1st of May in each year, the allegation is sufficient to charge that the property designated was within the district and liable to taxation on May 1, 1903.

The complaint is attacked, in that it affirmatively shows that defendant and the assessor and the clerk on the 24th of August, 1903, met and organized and acted as a board of review, and that the alleged forfeiture was incurred at this meeting. It is objected that the board of review had no authority to meet and organize on that day, because, under sec. 1060, Stats. 1898, the board was required to meet on the last Monday of June to perform this duty, and because, under sec. 1064, the assessment roll must be completed by the assessor and be delivered to the clerk on or before the first Monday in August. It is true, the statutes cited to our attention provide as indicated, but we cannot accede to the interpretation urged. To hold that assessing officers and members of boards of review shall be held strictly to the time specified for the performance of their duties under the statutes would result, practically, in a failure to administer the law for the assessment of taxes, under the varying difficulties and obstacles inhering in such a course. These provisions of the statutes pertaining to the assessment of taxes must have been intended by the legislature as directory in their execution, and a departure from the letter should not invalidate the action of such officers, unless it be shown that the rights of persons interested were thereby materially affected, to their prejudice. Cooley, Taxation, note on p. 774; *Faribault W. Co. v. Rice Co.* 44 Minn. 12, 46 N. W. 143.

The suggestion that the complaint is insufficient because it does not specifically describe the property, and thereby apprise the defendant of the charge preferred, and that it fails to allege he acted in his official capacity, cannot be entertained. It is stated that personal property liable to taxation in the assessment district was by him, as a member of the

board of review of the district where it is situated, intentionally omitted, and that he agreed to omit it, from assessment. This apprises defendant of the delinquency which plaintiff expects to prove against him at the trial, and charges him in his official capacity. If he has any grounds of complaint for indefiniteness, he must resort to his remedy by motion to make more definite and certain.

The last objection, as we apprehend it, is that if the section of the statute in question imposes a penalty on defendant for acts in his capacity as a member of the board of review, recoverable in a civil action, it is void, because it contravenes the spirit of the state constitution, and particularly sec. 22 of article I, and that it is contrary to public justice. The objection presented goes to important natural individual rights, but we are unable to perceive how it applies to the facts under consideration. Under the law, defendant, as a member of the board of review for an assessment district, is required to perform certain official duties in assessing property, which the legislature clearly has the right and power to impose. It has provided that any officer who shall intentionally omit to perform such duty shall be subject to a penalty recoverable in a civil action. The officer's obligation to execute the mandates of the law in that respect seems too well settled to require discussion. Nor does the form of procedure in any way affect the liability of the person who violates such a law. We cannot conceive how the statute in any way infringes any constitutional provision or violates public justice.

By the Court.—Order affirmed.

A motion for a rehearing was denied April 19, 1904.

WISCONSIN TRUST COMPANY and others, Respondents, vs. CHAPMAN, Appellant, and others, Respondents.
SAME, Appellants, vs. PIERCE, imp., Respondent.

February 29—April 19, 1904.

Administrators: Mortgage of land to pay claims: Personal liability: Assignment of notes: Bona fide *holders: Foreclosure: Costs: Estoppel: Stamp act.*

1. A transfer of real estate by an administrator, under the power and direction of the court, should be viewed in the light of his relation to the property and the objects to be accomplished, and the words of the transfer should be given an interpretation limited to the occasion.
2. Promissory notes and an accompanying mortgage of lands of a decedent, executed by an administrator under the direction of the court as security for a loan obtained in order to pay claims against the decedent, should be construed together.
3. Such instruments in this case are *held* to show on their face that they were executed by the administrator in his representative capacity under authority from the court, so that neither the original mortgagee nor *bona fide* purchasers obtained any right to enforce payment against the administrator personally.
4. In an action to foreclose a mortgage given by an administrator, where judgment was demanded against him personally for any deficiency, costs were properly awarded to him in a judgment determining that he was not personally liable and granting his counterclaim for reformation of the instruments accordingly.
5. An heir who appeared in the proceeding wherein the administrator was authorized to mortgage real estate, and afterwards assented to the settlement of the final account and discharge of the administrator and to the partition of the estate which gave her the mortgaged lands subject to the mortgage, is estopped to question, in an action to foreclose the mortgage, the regularity of the proceeding by which the mortgage was authorized.
6. Notes secured by a mortgage were executed to a trust company, which afterwards assigned the notes to several persons. In an action by the company and such assignees they obtained judgment of foreclosure. *Held*, on appeal, that the objection that the assignment of the notes was invalid because not properly stamped under the federal statutes is unavailing, since, even if such be the fact, the judgment should stand as properly awarded in favor of the trust company.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action to foreclose a mortgage and to recover a personal judgment for any deficiency that may exist after the application of the amount realized on the mortgaged property. The facts upon which the questions involved rest are as follows:

Sherburn Bryant died in February, 1895, leaving considerable property situated in Milwaukee county, consisting largely of real estate. *Oscar H. Pierce* was duly appointed administrator of the estate of the deceased. At the time of his death the deceased was indebted to a considerable amount, and the personal property left by him was not sufficient to pay these debts. *Oscar H. Pierce,* as such administrator, presented his duly verified petition to the Milwaukee county court in probate on May 16, 1898, setting forth the amount of the personal property of the estate available for the payment of the debts, the amount of the debts remaining unpaid, and that such personal property was wholly insufficient for the payment of the unpaid claims then ascertained and allowed against the estate, and setting forth such other matters as are required by sec. 3875, Stats. 1898, for obtaining a license to mortgage the real estate of the deceased as security for a loan for the payment of such debts. The amount necessary for such purposes was stated to be $35,000. An order was duly entered by the Milwaukee county court, directing that notice of this application be published and served on the heirs. Due proof of the publication and service of this notice on *Ethel Bryant Chapman* and other heirs was filed June 6, 1898. *Ethel Bryant Chapman* and other heirs filed objection to the application June 14, 1898. After hearing such objection, the Milwaukee county court in probate, on July 1, 1898, directed and authorized defendant *Oscar H. Pierce* to mortgage the real estate as security for a loan of the sum of $35,000 from the *Wisconsin Trust Company,* upon

the terms and conditions theretofore submitted to the consideration of the court, and that he carry out the conditions of the offer of the trust company for a loan. The offer was upon condition that the money loaned be evidenced by notes of $500 each, and that they be secured by three separate mortgages upon three different parcels of real estate, to secure respectively the payment of $8,000, $9,000, and $18,000. The court directed *Oscar H. Pierce,* before executing the mortgages and notes, or any of them, to give a bond to the judge of the Milwaukee county court, with sufficient security, to be approved by the court, conditioned that he disburse and account for all the money received under the loan.

On July 9, 1898, *Oscar H. Pierce,* as administrator of said estate, executed and delivered the mortgages, as directed by the court, to the *Wisconsin Trust Company;* and he also executed and delivered the series of thirty-six promissory notes of $500 each, evidencing the amount of said loan, secured by the mortgages on the real estate. These notes were all dated the same day, and contained the following as part of their contents:

"Milwaukee, Wisconsin, July 7, 1898.

"For value received, I, *Oscar H. Pierce,* administrator of the estate of Sherburn Bryant, deceased, acting under an order of the county court for Milwaukee, Wisconsin, dated July 1st, 1898, promise to pay to the *Wisconsin Trust Company,* or order, at the office of said company, in exchange on New York, the sum of five hundred dollars in United States gold coin of the present standard weight and fineness, or its equivalent, on or before the 7th day of July, 1903, with interest thereon at the rate of five per centum per annum," etc.

Aside from other stipulations in the notes, they had coupons annexed providing for the payment of interest. The mortgage recited that *Oscar H. Pierce,* as administrator of the estate of Sherburn Bryant, late of the county of Milwaukee, state of Wisconsin, was party of the first part, and

the *Wisconsin Trust Company* (plaintiff herein) the party of the second part, and among its provisions were the following:

"And the said *Oscar H. Pierce,* administrator aforesaid, for himself, his successors and assigns, covenants and agrees with the said party of the second part, its representatives and assigns, to keep the building or buildings now standing, or which may hereafter be erected on the above described premises, insured against fire."

"And to pay annually to the proper officers all taxes and assessments which shall be levied or assessed on said real estate, or any part thereof."

"That the said party of the first part, at the time of the ensealing and delivery of these presents, is the true, lawful, and rightful owner and proprietor of the said premises above described, and every part thereof, and is seized of a good, sure, perfect and indefeasible estate of inheritance therein in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell and convey the said premises, and every part thereof, to the said party of the second part, in the manner and form aforesaid . . . that the said party of the first part will forever warrant and defend the same to the party of the second part, its successors or assigns, against all claims whatsoever."

"And these presents are upon this express condition, that if the said *Oscar H. Pierce,* administrator, party of the first part, his successors or assigns, shall pay or cause to be paid to the said party of the second part, its successors or assigns, the just and full sum of eighteen thousand dollars ($18,000) at or before the expiration of five years from the date of these presents . . . according to the tenor or condition of thirty-six notes, bearing even date herewith, executed by the said party of the first part to the said party of the second part . . . then these presents, and the said notes, shall cease and be null and void."

"In case suit shall be brought for the foreclosure of this mortgage, the said party of the first part for himself, his heirs, successors, and assigns, covenants and agrees that he will pay to the said party of the second part, its representatives or assigns, the expenses incurred for the purposes of

the foreclosure suit, and will pay in addition to the taxable costs in such suit an adequate and reasonable sum as solicitor's or attorney's fee . . . to be included with the expenses above mentioned in the judgment or decree."

The proceeds of this loan were applied in payment of the debts of the estate by *Mr. Pierce* as such administrator. Partition proceedings were instituted, and the property included in the mortgage in question was set over to the defendant *Ethel Bryant Chapman,* subject to the mortgage. The final account of *Oscar H. Pierce* as administrator of the estate was allowed and finally settled March 18, 1899. On petition of the heirs, including *Ethel B. Chapman,* the estate was finally assigned and distributed. The real estate covered by this mortgage was assigned to *Ethel Bryant Chapman,* defendant herein. She made some payments of interest on the notes and mortgage until January 7, 1902.

In March, 1903, the *Wisconsin Trust Company* commenced this action for the benefit of the owners and holders of the notes covered by this mortgage, and thereafter the owners and holders of the notes were made parties plaintiff in the action. Defendant *Oscar H. Pierce* answered, denying any individual liability on the notes, and interposing a counterclaim asking that the notes and the mortgage be reformed by inserting a clause to the effect that it was understood and agreed, before the execution of said notes and mortgage, between himself and the trust company, that he should not be personally liable for the amount of the loan. The defendant *Ethel Bryant Chapman* appeared in the action, denying that plaintiff *Wisconsin Trust Company* was a legally authorized corporation under the laws of Wisconsin, and denying that *Oscar H. Pierce,* as administrator of the estate of Sherburn Bryant, deceased, had been duly authorized and licensed to mortgage the real estate of Sherburn Bryant, deceased, to secure the loan of $35,000, as asserted, and alleging that the notes and the mortgage were void and of no effect.

The court found as facts that the *Wisconsin Trust Company* was a duly organized and existing corporation under the laws of the state; that defendant *O. H. Pierce* was duly appointed administrator of the estate of Sherburn Bryant, deceased, and that he duly qualified and acted as such administrator, and that on July 1, 1898, he was duly licensed to mortgage the real estate, described in the complaint, for the term of five years, to secure the sum of $18,000, payable on or before five years, with interest at five per cent. per annum, payable semiannually, and in pursuance of this order *O. H. Pierce,* as such administrator, on or about July 9, 1898, made, executed, and delivered to the *Wisconsin Trust Company* a mortgage on the real estate described, to secure the payment of $18,000, evidenced by thirty-six notes of $500 each, of even date with the mortgage, promising to pay as stated in the notes and mortgage containing the provisions above recited; that the notes have not been paid as required, and that the owners have exercised the election to declare the whole amount due in default of the payment of interest, insurance, taxes, etc.; that the *Wisconsin Trust Company* was and is the holder of the mortgage, in trust for the purpose of securing payment for the benefit of the owners of all the notes, and that the notes are now held and owned by the several plaintiffs as alleged; that the several plaintiffs purchased the notes for value, before maturity and before the commencement of this action; that the several plaintiffs, owners of the notes, had no actual notice of the mutual mistake in omitting to insert a condition in the notes and mortgages, expressing the agreement, between the trust company and *O. H. Pierce,* that he should not be personally liable for the loan evidenced by the notes. The court also found the amounts due, with interest, and awarded judgment of foreclosure and sale of the mortgaged premises.

The court further found that the defendant *Ethel Bryant Chapman* was the owner of the real estate covered by the

mortgage; that it had been assigned to her as one of the heirs of Sherburn Bryant, deceased, subject to the mortgage; that she appeared in the county court in the proceedings to license *Mr. Pierce,* as administrator, to mortgage the real estate of decedent, and in writing assented that the final account of *O. H. Pierce,* as such administrator, be allowed, and that he be discharged; and that she accepted the division made in the partition proceedings, and assumed the obligations thereby imposed, and thereafter paid interest on the loan secured by mortgage on the real estate assigned to her.

This is an appeal from the judgment, by the *Wisconsin Trust Company* and other plaintiffs, in so far as it awards relief to *Oscar H. Pierce* in releasing him from personal liability for any deficiency that may be found to be due after applying the proceeds realized on the sale of the mortgaged premises, and that part of the judgment awarding him his costs in the case; also an appeal by *Ethel Bryant Chapman* from the whole of the judgment.

For the plaintiffs there were briefs by *Miller, Noyes & Miller,* and oral argument by *George H. Noyes.*

For the defendant *Oscar H. Pierce* there was a brief by *Nath. Pereles & Sons,* attorneys, and *G. D. Goff,* of counsel, and oral argument by *Mr. Goff.*

Rublee A. Cole, for the defendant *Ethel Bryant Chapman* on her separate appeal.

SIEBECKER, J. Defendant *Oscar H. Pierce,* as administrator of the estate of Sherburn Bryant, deceased, under a license duly granted him by the county court for Milwaukee county, made and executed the notes and the mortgage under the circumstances given in the foregoing statement of facts. The main controversy on this appeal pertains to the liability of the defendant *Oscar H. Pierce,* who was duly appointed, and who duly qualified, as administrator of the estate of Sherburn Bryant, deceased. That he, as such administrator,

has no interest in the real estate of the deceased, nor power to sell or incumber it, is elementary in the law of administration. The only authority to deal with real estate must come from the court from which he received his appointment, under the statutes providing for the disposition of lands by executors and administrators. Under these statutes, the real estate of the decedent may be applied in satisfaction of the decedent's debts, to the extent they remain unpaid after applying his personal property. The statutes grant county courts the power, under the procedure prescribed, to accomplish this object. To render a sale or mortgage of the lands valid within these provisions, there must be a substantial compliance therewith under the direction and authority of the county court. In exercising these powers administrators act as the instruments of the law, and they are strictly bound by the special authority vested in them for this purpose. A transfer of the real estate by an administrator, under the power and direction of the court, should therefore be viewed in the light of his relation to the property and the objects to be accomplished, and the words of the transfer should be given an interpretation limited to the occasion.

Applying these considerations to the instant case, what was the undertaking of the defendant *Oscar H. Pierce* under the notes and mortgage given the *Wisconsin Trust Company* to evidence the amount loaned by it for the purpose of paying the claims against the decedent by mortgaging his real estate? We must observe at the outset that this transaction of the administrator differs widely from the duties imposed on him by the law in the administration of the decedent's personal estate. As to the personalty, he was the owner and held the title for the beneficial interest of the creditors and heirs. In dealing with it he acts voluntarily and as owner, and solely in his personal capacity. In such transactions he represents no principal, and upon well-established rules he assumed all liabilities as personal in character, relying upon

his lien for indemnity out of the estate for expenses and liabilities incurred in a proper administration of his trust. In the disposition of real estate his duties are imposed by law and directed by the court, under the authority of the statute, and can be carried out only in the prescribed manner. He has no interest in or control over the property, except as he executes the mandates of the court to enforce the creditors' claims against the decedent's real estate. These grounds have been held to furnish the distinction between the administrator's liability in his personal and representative capacities in performing his duties as administrator of the estate.

It is contended that the instruments show on their face that the administrator assumed personal liability, in that the agreements and covenants cannot be held to bind the heirs, the only other persons concerned in the transaction, and that the notes must be treated as separate and distinct obligations from the mortgage. From the nature of the proceeding authorizing the execution of the notes and mortgage, it follows that they cover the same transaction and must be construed together. The conditions of this loan by the trust company were submitted to the county court before the loan was authorized. The kind of notes to be given to evidence the amount loaned and when payable, as well as the amount of the interest and when due, were covered and directed by the court's orders. This furnishes a good and sufficient explanation why the notes were executed, and that they were made by the parties under the license to mortgage, and intended as an execution of the authority given and directed by the court. The notes bear evidence on their face that this was the understanding, by reciting the administrator's authority in these words: "I, *Oscar H. Pierce,* administrator of the estate of Sherburn Bryant, deceased, acting under an order of the county court for Milwaukee county, Wisconsin, dated July 1st, 1898, promise to pay to the *Wisconsin Trust Company,*" etc. These are apt words to show the source of his authority

and that he acted in his representative and not in his personal capacity. The same considerations are applicable to the mortgage, which recites that he, as administrator of the estate of Sherburn Bryant, deceased, is a party to the instrument, and that the covenants and agreements therein were made by him as such administrator, without assuming any personal liability in the transaction.

It is, however, asserted that the purchasers of the notes obtained them as negotiable paper, and had a right to rely upon the administrator's personal liability. We cannot yield our assent to this contention, under the circumstances of this case. The notes on their face gave notice to the purchasers that they were made in a representative capacity, and that their execution was referable to the official duty of the administrator, and were limited in their effect by the authority of the county court to mortgage the decedent's real estate. With this notice before the purchasers, they were apprised of the real nature of the contract, and they, as well as others, were bound by the record in the county court where the estate had been administered. This imputes notice to the purchaser of the facts and the authority under which the instruments were executed, and thus gave them no more advantageous position than that of the trust company as the original holder. It follows that the trust company contracted with the administrator in his representative capacity to loan the amount upon the conditions submitted to the court, and accept the real estate mortgaged as security for the payment of the amount due under the contract, and, in default of it, it and its assigns can only enforce payment out of the proceeds of a sale of this real estate.

The following cases bear upon the question of an administrator's liability, in his personal and in his representative capacities, in administering and dealing with the decedent's estate: *McLaughlin v. Winner,* 63 Wis. 120, 23 N. W. 402; *Shontz v. Brown,* 27 Pa. St. 123; *Sumner v. Williams,* 8

Mass. 162; *Peirson v. Fisk,* 99 Mich. 43, 57 N. W. 1080; *Chouteau v. Suydam,* 21 N. Y. 179; *Thomas v. Parker,* 97 Cal. 456, 32 Pac. 562; *Kingsbury v. Wild,* 3 N. H. 30; *Van Bibber v. Reese,* 71 Md. 608, 18 Atl. 892; 2 Woerner, Administration, § 480.

Error is assigned upon the ground that the court awarded costs in this action to defendant *Oscar H. Pierce.* The conclusions we have reached make it apparent that the defendant *Pierce* had a good defense to the claim made against him by the plaintiffs. Nor do we find grounds for criticism of his course in pleading the matter set up in the counterclaim. This course was evidently adopted to bring to the court's attention all the matters available to him under the different phases of the case presented by the proof. His action is amply justified by the findings of the trial court in awarding him the relief demanded in his counterclaim as a good and sufficient avoidance of the demands of the complaint, though we deem the counterclaim immaterial in view of his complete defense in the action upon the grounds above stated.

The defendant *Ethel Bryant Chapman* appeared by attorney in the proceeding in the county court wherein the court authorized the mortgage in question. She also appeared at the settlement of *Mr. Pierce's* final administration account, and assented to its approval and his discharge by the court. She also accepted the partition of the estate, which gave her the property in suit, subject to the mortgage. Under these circumstances she is estopped by the court's decrees from raising the question of the irregularity of the proceedings in the county court which are involved in this litigation. *O'Dell v. Rogers,* 44 Wis. 136; *Heminway v. Reynolds,* 98 Wis. 501, 74 N. W. 350. No grounds are suggested by her upon which she can rest an objection that the *Wisconsin Trust Company* is not a corporation and that it had no power to make the contracts in question. We think the court properly held that the trust company was a duly

organized corporation, and that this defendant is not in position to question the legality of these instruments.

The further objection is made in her behalf that, at the time of the alleged transfer of the notes by the trust company to the other plaintiffs, no formally stamped assignment of the notes or interest in the mortgage securing their payment was made, and for that reason the assignment is invalid as violating the federal statutes prescribing the revenue stamp tax. This objection, if applicable to the holders of the notes, can in no way affect the right of the *Wisconsin Trust Company,* the original owner and holder of the notes and mortgage. The trust company is a party plaintiff to this action, and, if the other plaintiffs are not the owners of the notes and the interest in the mortgage, under the suggestion of appellant, then the judgment must stand as properly awarded in favor of the trust company and against *Ethel Bryant Chapman.* We find no reversible error in the record upon this ground.

These considerations cover all the material questions of the case, and make it unnecessary to consider other questions discussed in the briefs of counsel. The judgment of the circuit court was properly awarded as to the amount due, and in directing a foreclosure of the mortgage and a sale of the premises, and in applying so much of the proceeds as may be required to pay the debt, and that *Oscar H. Pierce* is not personally liable for the amount due on the notes and mortgage.

The reformation of the instruments as prayed for in the counterclaim of *Oscar H. Pierce,* and the decree of the court directing the insertion of the express stipulation that *Mr. Pierce* be not personally liable upon the notes and mortgage, become immaterial in our view of the case.

By the Court.—The judgment of the circuit court is affirmed.

CAMPBELL & CAMERON COMPANY, Appellant, vs. WEISSE and another, Respondents.

March 23—April 19, 1904.

Contracts: Entire or apportionable? Sale of chattels.

A contract for the sale of 200 cords, more or less, of hemlock bark, being the entire product of the vendor for the season, at $5 per cord, to be paid in cash within ten days from receipt in carload lots, is apportionable. The vendor may enforce payment for the portion delivered although he fails to deliver the balance; and the vendee's right to recover damages for such failure to deliver the whole is not conditioned upon payment having been made for the portion received.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This action is brought to recover a balance alleged to be due upon a contract to deliver hemlock bark to respondents. The contract was evidenced by the following letter:

"Oshkosh, Wis., July 27th, 1901.

"*C. S. Weisse & Co., Sheboygan Falls, Wis.*

"Gentlemen: Referring to your letters of July 5, 9 and 17, will say that we propose to accept your offer of Five Dollars per cord for Two Hundred cords, more or less, of Hemlock Bark, f. o. b. cars, Pratt's Junction, Wis., being the entire product of bark for this season. It is understood that we have the privilege of shipping the bark as soon as the roads are frozen and in condition to move the bark.

"Bark to be measured by actual measurement of 128 feet to the cord at Sheboygan Falls, as required by law, and measurements of each car reported to us at once, especially if your measurements do not agree with invoices.

"Terms: Spot cash within ten days from receipt of cars.

"Respectfully,

"CAMPBELL & CAMERON CO.

"By J. D. Campbell, Sec'y.

"Accepted July 30th, 1901,

"CHARLES S. WEISSE & CO.

"Sheboygan Falls, Wis.

"All cars loaded 20,000 pounds and over, or shipper to pay freight on short weight."

Between December 30, 1901, and January 13, 1902, appellant delivered eight car loads of bark. Appellant claimed that the cars shipped contained more cords than respondents reported. After shipment of these eight cars appellant refused to deliver more, expressing dissatisfaction with the measurements, whereupon respondents refused full payment of the amount due on the shipments that had been made, upon the ground that appellant had breached the contract. No more bark was shipped thereafter. The sum of $211.25 was paid appellant on the shipments made by it. The jury found that 81¼ cords of bark had been delivered under the contract; that appellant had 118¾ cords more, which it refused to deliver; and that bark was worth $7 per cord at Pratt's Junction, and that respondents were obliged to purchase elsewhere in place of the quantity not delivered by appellant. The testimony showed that 50¾ cords were sold elsewhere by appellant at Pratt's Junction that season, after the breach of the contract, and that they had not to exceed twelve cords ready for shipment.

Appellant brought action to recover the amount due for the quantity which they claimed had been shipped. Respondents deny that the quantity so claimed was delivered, and counterclaim for damages for the nondelivery of the bark at Pratt's Junction, by reason of which they were compelled to purchase elsewhere at an advanced price. By special verdict the jury found the quantity of bark delivered to respondents, the amount paid by them to appellant, and that appellant had refused to deliver 118¾ cords in their possession at Pratt's Junction. The court awarded damages to respondents on their counterclaim for the nondelivery of 118¾ cords at $2 per cord, and, after deducting the amount of $195, due for bark delivered, entered judgment in respondent's favor for $42.75 and costs. Before judgment, appellant moved to correct the special verdict by changing the answer to the second question from 118¾ cords to sixty-three

cords, which motion was denied. Appellant then moved that the special verdict be set aside, and for a new trial, and this motion was also denied. This is an appeal from the judgment.

The cause was submitted for the appellant on the brief of *Phillips & Hicks.* They contended, *inter alia,* that where the contract intends that there should be performance in distinct parcels at different times, a breach in respect to any instalment relieves the other party, at his option, from any further performance. *School Dist. v. Hayne,* 46 Wis. 511; *Lindon v. Eldred,* 49 Wis. 305; *Corbett v. Anderson,* 85 Wis. 218; *Walsh v. Myers,* 92 Wis. 397; *Boyington v. Sweeney,* 77 Wis. 55.

For the respondents there was a brief by *Bowler & Bowler,* and oral argument by *E. R. Bowler.* They argued, among other things, that where the contract is apportionable or divisible, as in this case, after delivery of part and on failure to deliver the whole the vendor may sue for the contract price of that already delivered, and the defendant may counterclaim his damages for the violation of the contract in not delivering the whole. *Goodwin v. Merrill,* 13 Wis. 658; *Sawyer v. C. & N. W. R. Co.* 22 Wis. 403; *Gill v. Benjamin,* 64 Wis. 362–368; *Schweickhart v. Stuewe,* 71 Wis. 1–7; *Hoffman v. King,* 70 Wis. 383; *Myer v. Wheeler,* 65 Iowa, 390, 21 N. W. 692; *Hansen v. Consumers' S. H. Co.* 73 Iowa, 77, 34 N. W. 495; *Osgood v. Bauder,* 76 Iowa, 550, 1 L. R. A. 655; *Winchester v. Newton,* 2 Allen, 492.

SIEBECKER, J. The exception especially urged by appellant bears upon the construction given the contract by the trial court. The foregoing statement of facts shows that appellant contracted with respondents for the sale and delivery of its entire season's product of hemlock bark of 200 cords, more or less, at $5 per cord; the terms of payment being cash within ten days from receipt in carload lots. The court

held the contract apportionable. An inspection of its terms discloses that the bark as purchased was to be delivered in definite portions, and that the price of each portion was payable upon delivery at the fixed contract price, and that such payment was not conditioned upon the delivery of the remaining portions of the season's product, nor was the requirement of a full delivery of the quantity purchased conditioned upon payment having been made for the portions shipped. Respondents' default of payment for any carload shipment at the time agreed upon gave appellant a right to enforce payment for the quantity delivered, regardless of its intention to fully perform its obligation to deliver the remainder of the bark. Respondents were likewise entitled to insist upon full performance of the contract in having the quantity purchased delivered, though there be default in payment of the quantity delivered, upon the ground that the payment for such delivery is not a condition precedent to the complete performance of the contract by appellant. Appellant failed to deliver all of the bark covered by the contract, and therefore became liable to respondents for the damages resulting from such breach. *Goodwin v. Merrill,* 13 Wis. 658; *Widman v. Gay,* 104 Wis. 277, 80 N. W. 450; *Palm v. O. & M. R. Co.* 18 Ill. 217; *Christian Co. v. Overholt,* 18 Ill. 223.

It is claimed by appellant that the court erred in refusing to set aside the finding of the jury as to the quantity of bark it failed to deliver under the contract. The jury found that it amounted to 118¾ cords. We are unable to find any evidence in the case supporting this finding. The only evidence bearing upon the question of the quantity of bark appellant had at Platt's Junction was the testimony of its woodman, Mr. Henke, who fixed the quantity at not to exceed sixty-three cords. Upon this state of the proof the court should have granted the motion to change the answer to the second question in the special verdict, striking out the finding that

appellant failed to deliver 118¾ cords of bark under the contract, and substituting the quantity shown by the undisputed evidence, sixty-three cords. There is no claim that the damages to respondents for the breach of the contract was other than at the rate of $2 per cord for the undelivered quantity, making a total of $126; nor is there any controversy but that respondents owed a balance of $195 for the portion delivered before suit was commenced. Appellant was entitled to judgment for the difference between the balance so found due it for the bark delivered and the amount of damages respondents sustained by appellant's failure to deliver the entire quantity covered by the contract, with the costs of the action.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to amend the special verdict by changing the answer to the second question, and to enter judgment in appellant's favor for the balance due it as specified in the opinion, with costs.

EHRLICH, Appellant, vs. BRUCKER, Respondent.

March 23—April 19, 1904.

Partnership: Findings: Evidence: Interest.

1. In an action to dissolve an alleged partnership and for an accounting, findings of the trial court—to the effect that no partnership ever existed between the parties; that of certain goods which plaintiff claimed to have furnished and put into the business, a part had been purchased and paid for by defendant and a part had merely been placed in defendant's store for sale; and that defendant, having had the benefit or received the proceeds of the latter, was liable to plaintiff in a certain sum as a balance over and above payments thereon—are *held* to be sustained by the evidence.

2. Where there is no agreement to pay interest on a loan, and repayment is made on demand, the borrower is not liable for interest.

APPEAL from a judgment of the circuit court for Fond du Lac County: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was commenced May 17, 1900, to dissolve a partnership alleged to have been entered into by the plaintiff and defendant April 8, 1899, and for an accounting of the net profits and business of the firm from that date to January 1, 1900. The complaint alleges, in effect, that each party was to put into the business $2,500, and that the plaintiff put in $1,000 in cash and $1,850.80 in goods, wares, and merchandise, and that in January, 1900, the defendant excluded plaintiff from the business. The defendant answered to the effect that the plaintiff and defendant had never been partners, and that no partnership agreement ever existed between them; that the defendant received $1,000 from the plaintiff, which he had repaid to her in full; that he had employed the plaintiff in his store to assist him in managing and teaching him to manage the business, and had fully paid her for her services; that while she was there she brought some "household goods" into the store, and sold the same, and received the proceeds thereof, and that the defendant received nothing therefrom; and otherwise denied each and every allegation of the complaint.

Thereupon the cause was tried, and the court found as matters of fact in effect: (1) That no partnership was formed by or existed between the plaintiff and the defendant. (2) That from April 8, 1899, to January 6, 1900, the plaintiff worked in the defendant's store at Fond du Lac as his employee for hire, and not otherwise; that for her services so rendered the defendant paid her as full compensation $10 per week. (3) That in March or April, 1899, the plaintiff loaned to the defendant $1,000, which sum he repaid to the plaintiff in February or March, 1900; that no part of the

$1,000 was put into the business by the plaintiff as a partner therein, nor was the same a contribution on her part to the capital invested in the business; that she loaned or deposited said $1,000 with the defendant on his promise to repay it to her on demand, and that he had repaid to the plaintiff the principal sum of $1,000. (4) That certain goods were shipped from Chicago to the defendant's store at Fond du Lac in May or June, 1899, and that in the plaintiff's presence, and with her full knowledge and approval, the defendant purchased those goods from her husband, one L. B. Ehrlich, as the owner thereof, and promised to pay him for the same; that the plaintiff did not put said goods into the store of the defendant as partner or otherwise, and that she has no lawful claim or demand against the defendant on account thereof, and that the plaintiff never owned said goods. (5) That certain other goods, known as "household goods," were removed from the plaintiff's dwelling house at Fond du Lac to the store of the defendant in that city on or about April 8, 1899, and that said goods were placed in said store to be sold for the plaintiff's benefit and by her or under her direction, but that the same were not put in by the plaintiff as partner in the business, nor with the understanding or agreement that said "household goods" should become a part of the stock in trade in said store in the sense that the defendant had or should have any interest in said goods, and that the defendant never had any interest in said goods, and never made any agreement with the plaintiff in respect thereto, other than she might sell them in the store for her own benefit as her own goods; that some of such "household goods" were sold from the store while the plaintiff was so in the defendant's employment; that some of such sales were made by the plaintiff and some by others of the clerks in said store; that some of the proceeds were paid directly to the plaintiff, and were by her rightfully appropriated to her own use; that certain of the proceeds of such sales of said "house-

hold goods" were paid over to the cashier of the store, and went into the store funds, and the defendant had the benefit thereof; that when the plaintiff was so discharged by the defendant January 6, 1900, some of the "household goods" were left by the plaintiff in the store of the defendant, and that thereafter certain sales thereof were made, and the proceeds were received by the defendant, and applied to his own use. (6, 7) The court being unable to determine from the evidence the character, amount, or value of such "household goods" belonging to the plaintiff of which the defendant had received the benefit, or to state the true account between the parties by reason thereof, the court, upon its own motion, referred the matters in controversy as to such "household goods" to a circuit court commissioner, to hear, try, and determine the same and report thereon to the court, in effect, as to whether the defendant had received or had the benefit of any portion of such goods, and the amount and value thereof, and whether the plaintiff had taken from the store or had the benefit of any portion of such goods, and the amount and value thereof, and to state the account between the plaintiff and defendant in respect thereto, giving to the defendant credit for $171 paid by him to her after she was excluded from the store, January 6, 1900; and also to credit him for the amount of the goods sold and delivered by him to her after such last-named date, and the amount of the proceeds of sales of such "household goods" received by the plaintiff and appropriated by her to her own use, and charging the defendant with the proceeds of sales of such goods of which he had the use and benefit, and charging him with accrued interest, if any, on the $1,000 mentioned.

After hearing the parties and considering the evidence in the case, the court commissioner found upon the questions so submitted to him as matters of fact, in effect, that the "household goods" mentioned in the findings of the court were of the aggregate value of $748.18; that they were intermingled

by the plaintiff, with the knowledge and consent of the defendant, with the goods belonging to the defendant in the store, and that it was impossible for the parties, as shown by their testimony, to identify very many of the "household goods," or distinguish them from those belonging to the defendant; that such goods were so intermingled with the intention of both plaintiff and defendant that such goods should be sold in the store and the plaintiff receive the results of such sales; that it was impossible from the testimony to report each article of the "household goods" and its value, then in the defendant's store, or to determine whether any of such goods were still in the store; that on the trial before the referee the defendant offered to permit the plaintiff to select, if she could, such "household goods" as remained in the store, and to examine his books and sales slips to aid her in doing so; that by reason of the intermingling of the "household goods" with other goods in the store it was impossible for the defendant to select the "household goods," if any, which might have remained unsold at the time of the trial, in order to tender them to the plaintiff; and also impossible for the plaintiff to take advantage of the defendant's offer to permit her to select the "household goods" then remaining on hand; that up to the time of the trial before the referee such goods were sold by the defendant in the usual course of trade, with his own goods; that the defendant never agreed to pay interest on the $1,000 loaned to him by the plaintiff, and was not liable for interest thereon. The referee charged to the defendant the whole amount of such "household goods" so placed in the defendant's store by the plaintiff ($748.18), less the items which had been received by the plaintiff, and less the item of $171 paid by the defendant to the plaintiff, as found by the court; leaving a balance due to the plaintiff from the defendant of $541.53.

The court refused to modify such findings of the referee, and denied the defendant's motion to re-refer the cause, and

on motion of the plaintiff confirmed the referee's report and ordered judgment thereon in favor of the plaintiff for the amount last above mentioned. From the judgment entered thereon accordingly, with costs, the plaintiff appeals.

For the appellant there was a brief by *Duffy & McCrory,* and oral argument by *J. H. McCrory.*

For the respondent there was a brief by *Swett & Ecke,* and oral argument by *H. E. Swett.*

CASSODAY, C. J. 1. The important question presented is whether the finding of the trial court that no partnership ever existed between the plaintiff and the defendant is sustained by the evidence. There is no pretense that there was ever any written agreement or articles of copartnership. The plaintiff's claim is that she entered into an oral agreement with the defendant wherein and whereby they agreed to run and operate a general department store at the city of Fond du Lac. In her verified complaint she alleges that such agreement was made April 8, 1899. In her testimony she swears that "the partnership was formed about the last part of November, 1898," at her house in the city; that they opened the store April 8, 1899, and that she was sent away January 6, 1900. There is considerable testimony tending to corroborate the plaintiff as to the existence of such copartnership. It consists largely in admissions or statements of the defendant to the effect that the plaintiff was interested in the business, or was his partner. The defendant flatly denied that he was ever in partnership with the plaintiff. The circumstances were peculiar. It appears, and is undisputed, that prior to December 1, 1898, the plaintiff and her husband conducted a mercantile business in the store building in question in the name of B. Ehrlich—the plaintiff's father-in-law—who at the time resided in Chicago. That building was owned by the defendant's wife. B. Ehrlich failed in that business in November, 1898, and December 1, 1898, the defendant was

appointed temporary receiver of the property. The defendant had had no experience in mercantile business. He had some years before been a farmer and lived in the country and upon being elected sheriff had moved into the city, where he continued to reside. The result was that he employed the plaintiff and her husband to assist in closing out the business, and for that purpose the store building was occupied until April 1, 1899, when it was closed up. The fact of that building being vacant and the defendant having seven grown-up children, the oldest of which was twenty-nine years of age, and the offer of the plaintiff and her husband to work for him very cheaply, and buy goods for him, and teach and educate him and his children in the business, induced him, according to his testimony, to go into the business in his own name. There is much testimony tending to corroborate the statement of the defendant that he was never in partnership with the plaintiff. Certainly we cannot hold that the finding that the plaintiff and defendant were never in partnership is against the clear preponderance of the evidence.

2. Of the $1,850 worth of goods which the plaintiff claims to have furnished and put into the business, she testified that $1,075 in value thereof were purchased by her of one Frank in Chicago at a discount of nearly $200 by reason of their being in broken lots and broken boxes. The trial court found that said last-mentioned goods were shipped from Chicago to the defendant's store in May or June, 1899, and that the defendant, in the plaintiff's presence, and with her full knowledge and approval, purchased those goods from the plaintiff's husband, as the owner thereof, and promised to pay him therefor; and that the plaintiff did not put such goods into the store as partner or otherwise; and that she had no lawful claim or demand against the defendant on account thereof and that the plaintiff never owned said goods. The defendant testified to the effect that he understood that the goods had been bought by the plaintiff's father-in-law in

Chicago, who had opportunities for buying up goods for fifty or sixty cents on the dollar, in pursuance of a conversation which the defendant had with the old gentleman in March previous; and that the defendant agreed to pay the plaintiff's husband for the goods so shipped from Chicago, according to the invoice which should be made out—being about eight or nine hundred dollars. There is considerable testimony tending to corroborate the defendant's version of the transaction. There is some evidence tending to prove that some of the goods so shipped from Chicago were part of the goods which formerly belonged to the plaintiff's father-in-law. Certainly, we cannot hold that the finding of the trial court as to those goods so shipped from Chicago is against the clear preponderance of the evidence.

3. Since there never was any partnership between the plaintiff and the defendant, it is obvious that the findings of the trial court and the referee as to the "household goods," so called, were in favor of the plaintiff. As indicated, the defendant was charged with the full amount of those goods, except such as the plaintiff received or had the benefit of; and, in addition, the defendant was credited with the $171 which the court found the defendant paid to the plaintiff after she left the store January 6, 1900, leaving the balance against the defendant as found by the referee and adjudged by the court.

4. Counsel for the plaintiff claims that the evidence did not warrant this credit of $171. But just before the testimony was closed the plaintiff was recalled, and testified to the effect that after she left the store the defendant made four cash payments, amounting in the aggregate to $171. So that finding is supported by the evidence. Prior to that time the plaintiff had testified to the effect that after she left the store she had her husband get from the defendant $500 about February 1, 1900, and $500 more about March 1, 1900. These two items make the $1,000 which the court

found to be a repayment of the $1,000 which the plaintiff had previously loaned to the defendant. So there is no dispute as to such payments.

5. The court and referee also found that neither at the time of making such loan nor at any other time was there any agreement or understanding that the defendant would pay any interest thereon to the plaintiff. There is no evidence of any demand that such repayment should be made prior to the time it was actually made. There was no error in holding that the defendant was not liable for the payment of interest on such loan. *Laycock v. Parker,* 103 Wis. 161, 187, 188, 79 N. W. 327.

By the Court.—The judgment of the circuit court is affirmed.

KATH, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

March 24—April 19, 1904.

Railroads: Injury to employee: Expert testimony: Subjective symptoms: Warning of danger: Assumption of risk: Trial: Issues as to negligence: Proximate cause: Contributory negligence.

1. In an action for personal injuries evidence as to statements of the plaintiff to his physician is admissible only when they were made for the sole purpose of obtaining treatment before litigation was begun or threatened.
2. An expert medical witness cannot state what he has learned entirely from medical works, unsupported by practical experience of his own; but on motion to strike out testimony it should be affirmatively shown to be within such rule of exclusion.
3. As to the engineer and fireman of an engine sent to assist in putting out the fire on a burning railway bridge whose exact location they knew, there was no duty on the part of the railway company to display signals or give other warning of the location and condition of the bridge; and such employees assumed the risks ordinarily incident to the work.

4. In an action for injuries to a locomotive fireman, caused by the fall of his engine through a burning bridge, the complaint charged specifically, among other things, that the engineer was negligent in failing to stop before reaching the dangerous place. This charge was apparently lost sight of on the trial. There is no affirmative evidence that it was abandoned and, though the issue was not covered by the special verdict, the form of the verdict itself shows that the charge was not deemed to have been proven by uncontradicted testimony. The jury found that failure to display signals or give warning of the danger was the proximate cause of the injury. *Held*, that this excluded another proximate cause, and plaintiff cannot have a judgment in his favor affirmed on the ground that the negligence of the engineer was conclusively established.
5. Whether the fireman was himself negligent in failing to warn the engineer of their approach to the burned portion of the bridge is *held*, upon the evidence, to have been a question for the jury.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries. The plaintiff was a locomotive fireman in the employ of the defendant, and on the night of January 20, 1901, at about 9 o'clock p. m., the engine which he was firing fell through a wooden bridge, which had been partially burned, upon the defendant's road, and the plaintiff was seriously injured. The complaint charges negligence in three respects: (1) Failure to place warning lights or signals at the ends of the defective bridge; (2) the maintaining of a defective air brake upon the engine, which would not work when applied; and (3) the failure of the engineer in charge of the engine to stop the same before reaching the burned part of the bridge. The answer admits that the plaintiff was injured at the time and place alleged, but denies all negligence.

Upon the trial many facts were undisputed. The claim that the air brake was defective was abandoned. It appeared that the plaintiff had been fireman for the defendant since March, 1900, and had made some thirty-five trips over

the piece of road containing the bridge in question, about one third of which trips were taken at night; that the bridge was a wooden bridge, 617 feet in length, and about fourteen feet above the surface of the water; that it was situated about two miles west of the city of Stevens Point; that about midway between the city of Stevens Point and the bridge is a cut in the rock, called "Rock Cut," through which the track passes, and about 1,300 feet west of this cut is a highway grade crossing, and about a half mile further west a short bridge, ninety-four feet long, from which bridge the east end of the bridge in question is about 1,200 feet distant; that the railway track for a distance of about 3,500 feet east of the bridge in question is level; that, about 6 o'clock p. m. on the day named, a fire started in about the center of the bridge, and soon thereafter information of the fire was conveyed to the depot at Stevens Point, and a switch engine, with a crew, went out from that city to attempt to put out the fire, returning when the water in the tank was exhausted, and leaving a number of men engaged in fighting the fire by getting water in pails from the river below and throwing it upon the bridge; that the plaintiff reached Stevens Point on the preceding day upon engine No. 122, and was at Stevens Point on the evening in question, and at about half past seven said engine, with a caboose and its crew, were ordered to proceed to the burning bridge to help put out the fire; that they proceeded, with the engine, tender, and caboose, to the bridge, saw the fire as soon as they passed through the cut, and stopped at the east end of the bridge and had conversation with the men who were trying to put out the fire, and it was decided that the engine should be run back to Stevens Point, and turned around, so that the water tank would be in advance, and the water therein could be more readily thrown upon the fire; that this was done, and occupied nearly half an hour's time, and, when the engine approached again, it had been turned around, and the water tank was ahead, both

the fireman and the engineer being in the cab of the engine; that the engine ran directly onto the burned portion of the bridge, which gave way, thus precipitating the engine onto the ice below and severely injuring the plaintiff; that the burned portion of the bridge was about seventy-five feet in length, and was near the middle, there being 278 feet east of the burned portion, and 264 feet west.

The engineer was not called as a witness. The plaintiff testified that when they approached the bridge on the second trip no fire was visible; that the engine started upon this second trip at a speed of about fifteen miles per hour; that he remembered passing through the cut and over the highway crossing; that then the engineer shut off the engine, and he (plaintiff) got down and shoveled in some coal; that he did not notice the smaller bridge; that after putting in the coal he kept a lookout, and asked the engineer if they were not near the bridge; that the engineer said: "No. Do not get excited. We are a good ways off yet;" that the engine was then going at the rate of from three to five miles per hour, the steam having been shut off. The plaintiff, on cross-examination, described the accident thus:

"After I got onto the bridge, I hollered at the engineer. I says: 'For God's sake, stop! We are gone.' I cannot tell you where the engine then was with reference to the south end of the bridge. It was on the bridge. After we struck the bridge, I hollered at him, and that was all. As soon as we struck the bridge he threw the engine into emergency—the air brake—and reversed the engine. That is, he threw the engine into forward motion. I saw him do it. I was sitting on the seat. I didn't see the fire, nor any reflection in the sky from the fire. I didn't have time to try to get out. I cannot say how quick it was after I made this expression to him that the engine went down. It was quicker than I had much time to think. I did not have time to get out at all, nor to jump off my seat. I went down on my side before I could get off my seat."

Certain rules of the defendant company were put in evidence, requiring the display of danger signals or the stationing of a person to warn approaching trains at or near any obstruction or danger upon the track. The evidence showed that there was no signal or person stationed at the east end of the burned bridge when the engine approached it. There was considerable testimony contradicting the plaintiff's claim that when he approached the bridge for the second time no fire was visible. The evidence showed without dispute that the engine could have been stopped in a distance of from fifteen to twenty-five feet when it was going at the rate of from three to five miles per hour. The following special verdict was returned by the jury:

"1. While plaintiff, *William Kath,* was riding upon a locomotive of the defendant company over its railway, and was engaged in the performance of his duty as a locomotive fireman in the employment of the defendant, on January 20, 1901, about 9 o'clock at night, did plaintiff sustain personal injury by reason of said locomotive, with plaintiff therein, having fallen through a railway bridge situated upon and forming part of defendant's railroad track, about two miles northwest from Stevens Point, Wisconsin? *Answer* (by the court by consent of counsel). Yes.

"2. Was the injury which plaintiff sustained caused by the defective condition of said bridge, which resulted from the weakening and partial destruction thereof by fire on January 20, 1901. *A.* Yes.

"3. Did the defendant company, through Charles Parman, its foreman of the section in which said bridge was then situated, have actual knowledge of the defective condition of said bridge during a sufficient period before plaintiff was injured to have enabled defendant, by the exercise of ordinary care and vigilance, to have displayed lights as danger signals, and to have stationed men at said bridge, at and before the time of plaintiff's injury, for the purpose of warning approaching trains and locomotives of the location and defective condition of said bridge? *A.* Yes.

"4. Not considering the light, if any there was, proceeding from the fire in the bridge at the time when plaintiff was injured, did the defendant company fail to have then and there displayed any light, or fail to have then and there stationed any person, for the purpose of giving notice and warning to all approaching trains and locomotives of the location and condition of said bridge? *A.* Yes. As to light, we answer, they did so fail. As to having a person stationed there, we answer, they did so fail.

"5. When plaintiff made his first trip to the bridge on the night of his injury, did he then and there learn, or by the exercise of ordinary care should he have learned, that a portion of the bridge was destroyed by fire, to such an extent as to be incapable of supporting the weight of the locomotive? *A.* No.

"6. At the time when plaintiff was injured, was the fire which partially destroyed the bridge emitting light sufficient to have given timely warning of the location of the bridge to plaintiff as he approached on the locomotive, if he were then exercising ordinary care and vigilance in the performance of his duty? *A.* No.

"7. On the second trip to the bridge on the night of the injury, did defendant fail to give to plaintiff, or to any person on the locomotive, by or through any person stationed at or near said bridge, notice or warning of its location? *A.* Did so fail.

"8. Did the exercise of ordinary and reasonable care and vigilance require that, at the time when plaintiff was injured, the defendant should have had some person stationed or some proper light displayed at or near said bridge to give to the persons or to plaintiff's locomotive notice and warning of the precise location of the bridge, *A.* Yes.

"If both of your answers to the fourth question be 'No,' do not answer this ninth question.

"9. On his second trip to the bridge, and before the locomotive arrived there, on the night of the injury, did plaintiff know, or by the exercise of ordinary care and vigilance should he have discovered, that, excepting the light, if any, caused by the fire in the bridge, there was no light displayed nor person stationed at or near said bridge to give notice or warning of its location? *A.* Yes.

"10. Did any want of ordinary care on plaintiff's part

contribute to produce the injury which he sustained on January 20, 1901? *A.* No.

"11. Was the defendant's failure to display a proper light as a signal, and to station some person at the bridge to give notice and warning to plaintiff of the location of the bridge, the proximate cause of plaintiff's injury? *A.* Yes.

"11½. Is plaintiff now suffering from any spinal injury which is the natural and probable consequence of his fall from the bridge on January 20, 1901? *A.* Yes.

"If your answer to question 11½ be 'No,' do not answer the twelfth, thirteenth, nor the fifteenth questions.

"12. If the spinal injury exists, of which plaintiff complains, is it reasonably certain that the same will be permanent? *A.* Yes.

"13. If said spinal injury exists, is the same due either in whole or in part to plaintiff's having fallen from the ice run or inclined plane at Janesville on January 6, 1899? *A.* Neither in whole nor in part.

"14. If the court shall be of the opinion that the plaintiff is entitled to judgment in his favor, what sum will reasonably compensate him for the injuries which he sustained by reason of having fallen through said bridge while riding on said locomotive? *A.* Twelve thousand dollars.

"15. If your answer to the twelfth question be 'Yes,' then answer this: In the award of damages made by your answer to the fourteenth question, what sum, if any, is included as compensation for permanent injury to plaintiff's spine? *A.* Eight thousand dollars."

The defendant moved to change the answers to questions Nos. 5, 6, and 10 from "No" to "Yes," and the answers to questions Nos. 8, 11, and 11½ from "Yes" to "No," and to render judgment for the defendant upon the verdict as so amended. This motion being overruled, the defendant moved to set aside the verdict and for a new trial. This motion being also overruled, judgment for the plaintiff was rendered upon the verdict, and the defendant appeals.

For the appellant there was a brief by *Howard Morris* and *Thomas H. Gill,* and oral argument by *Mr. Gill.*

O. H. Ecke and *H. E. Swett,* for the respondent.

WINSLOW, J. An objection to certain evidence will be first considered. The plaintiff was injured in January, 1901, and commenced this action in the following April. Dr. Gavin treated him regularly from the time of his injury until the following October. Dr. Baker was consulted by plaintiff August 13, 1901, and made an examination of the case at that time, and a further one on the 3d of September following, and treated the plaintiff as a physician regularly after the first examination. Dr. Baker was put on the stand by the plaintiff, and asked to state what the plaintiff said to him as to his injuries and feelings at the time of the first examination—in other words, to state subjective symptoms. Objection being made to this testimony as incompetent, irrelevant, and immaterial, and as self-serving statements made for the purpose of having the witness testify to them as an expert on the trial, the court allowed defendant's counsel to examine the doctor preliminarily on the subject; and from this examination it appeared that some two weeks before August 13, 1901, one of the plaintiff's attorneys met the witness on the street and said that he had a man whom he would like to have the doctor examine, and that he wanted to find out exactly what ailed him, but did not state for what purpose, nor give the proposed patient's name; that when plaintiff came, and was first examined, he (Dr. Baker) did not know he was the man to whom the attorney referred; he knew he had been injured on defendant's railroad, but was not certain whether he learned that there was litigation pending at that time or on September 3d; that he learned that he was to be called as an expert on the last-named date, and then made another examination, taking notes; that he commenced to treat the plaintiff in August. On this statement the witness was allowed, against objection and exception, to relate fully all the statements made to him by the plaintiff as to his condition at the time of the first examination, in August, on the ground that the witness was in good faith treating the

plaintiff as a physician, and hence that statements made by the patient were admissible under the rule laid down in *Keller v. Gilman,* 93 Wis. 9, 66 N. W. 800. In that case there was an attempt made to formulate the rules governing the admission and rejection of evidence as to subjective symptoms of a patient in a way which should cover all cases. The present contention shows how futile the attempt was. It was there said that such statements may be given in evidence when made to a physician for the purpose of treatment, but may not when made to an expert after action brought in order to enable him to testify as a witness on the trial. This seems clear enough until a case is presented like the present, where the statements are made both for the *bona fide* purpose of treatment and to enable the physician to testify as an expert on the trial. On principle, we think such testimony should not be admitted. It seems to us to be equally as objectionable as the evidence of subjective symptoms made to a physician for the *sole* purpose of enabling him to testify as an expert. Whenever such statements are merely narrative, and not part of the *res gestæ,* their relation on the witness stand is purely hearsay testimony. The rule which admits them when made in good faith before action solely for the purpose of treatment is an exception to the general rule excluding hearsay testimony. The exception is evidently based upon the idea that there can be no reasonable probability that such statements are made with any self-serving purpose; that there is every reason to believe that they are true, because it would be absurd, not to say stupid, for a patient to make false statements to a physician who is to treat the disease, and who must base his treatment in part on such statements. While there is not that strong probability of truth which is held to make admissible a statement made in the immediate view of death, there is some similarity in the two cases, in this: that the circumstances seem in each case to negative the idea that testimony would be manufactured, and, on the other

hand, to indicate that there would be every inducement to state the truth. It is evident that this condition only exists where the patient seeks a physician for the *sole* purpose of obtaining treatment before litigation is begun or threatened. If he joins with that purpose an intention to call the physician as an expert upon the trial of his case, whether then pending or to be commenced, then there is distinctly present the temptation to manufacture testimony when stating his symptoms and feelings to the physician. An easy way is thus opened to put any quantity of self-serving *ex parte* statements before the jury, by simply employing an expert to give a few days' treatment to the patient, and then putting the expert on the stand in his dual capacity of expert and attending physician. The case of *Cleveland, C., C. & I. R. Co. v. Newell,* 104 Ind. 264, 3 N. E. 836, is cited to us in support of the ruling of the court, and it is fair to say that it seems to do so; but the reasoning is not satisfactory to us, and we hold that evidence of declarations made by a patient to a physician after action is brought or threatened is inadmissible, where it is proposed to call the physician as an expert, notwithstanding that the patient may at the same time, in good faith, be seeking and receiving medical treatment.

A minor question arises upon the motion to strike out a part of the cross-examination of Dr. Minahan, a medical expert called by the plaintiff, who had made a recent physical examination of the plaintiff. Dr. Minahan had testified to the fact that he found atrophy or flattening of one of the spinal muscles, and that, in his opinion, the cause of the flattening was that the nerves supplying those muscles had been injured, but that the name of the nerve is not given in the authorities, and he did not know from his own experience what nerve it was; that he could not come to a conclusion as to the cause of the flattening of the muscle without the aid of some authority; that he was testifying from his knowledge of what the authorities state under those circumstances. Mo-

tion was made to strike it out. It does not clearly appear just how much testimony the motion to strike out covered, nor does it appear affirmatively that the doctor never had a case of this kind or involving these questions. The rule is that an expert medical witness cannot state what he learns entirely from medical works, unsupported by practical experience of his own, but the rule goes no further. *Zoldoske v. State,* 82 Wis. 580, 52 N. W. 778. We cannot say that it appears that such was the case here, and, in the uncertain state of the record as to the scope of the motion to strike out, we are unable to say that there was prejudicial error in the ruling.

Passing now to questions involving the merits of the controversy, we first meet the question whether the defendant's motion for a directed verdict should have been granted. Upon this question the defendant's argument is that the only ground of negligence claimed was the failure of the men at the burning bridge to give warning signals or station a man at the end of the bridge as the engine approached the second time, and that the rules requiring the giving of signals when any break or obstruction in the track is discovered do not apply where employees knowingly start out to repair or attend to the very defect in question, and know its location. It is impossible for us to see how the logic of this argument can be successfully avoided. The plaintiff and his colleague, the engineer, knew that the bridge was on fire and hence was necessarily a dangerous place. They had been informed of the fact, and, if that was not enough, they had been to the bridge and seen the fire themselves. They were sent to help put out the fire, and went without protest. They were experienced railroad men, and had passed over this very bridge numerous times, and knew its location. To say that they needed to be advised of danger when they approached the bridge the second time, by means of a lantern or other signal, seems well-nigh preposterous. The very mission they were sent on was an advertisement of danger and a warning to

approach with care. They certainly assumed all the risks that might ordinarily be expected to be present because of the weakening of the bridge by fire. Employees who voluntarily engage in building or repairing operations assume the ordinary risks always present in such operations. The rule that an employer must furnish a safe place to work has no proper application to such a situation. The place to work is being changed constantly, and is necessarily incomplete and dangerous; and the employee knows it, and accepts such risks as are ordinarily present in such operations. *Porter v. Silver Creek & M. C. Co.* 84 Wis. 418, 54 N. W. 1019; *Gulf, C. & S. F. R. Co. v. Jackson,* 65 Fed. 48; *Moon-Anchor C. G. Mines v. Hopkins,* 111 Fed. 298; *Armour v. Hahn,* 111 U. S. 313, 4 Sup. Ct. 433. When a man is employed for the express purpose of putting an unsafe structure in safe condition, it is absurd to say that the employer must have it in safe condition when the man goes to work. If such were the rule, how could unsafe structures ever be repaired or their condition investigated? Our conclusion upon this branch of the case is that as to the plaintiff and the engineer who were sent to co-operate in putting out the fire on the burning bridge, and knew its exact location, there was no duty to display warning signals. They knew all that warning signals could tell them, and more, and hence needed no signal.

If the failure to display warning signals were in fact the only ground of negligence claimed, the disposition of the case would be indeed easy, but such is not the fact. The complaint charges distinctly that it was the defendant's duty, through its engineer, to stop the engine before reaching the burned portion of the bridge; that the plaintiff relied upon the discharge of that duty; that the engineer negligently failed to discharge that duty, and because of such failure the engine fell through the bridge. Here is a definite charge of negligence by a co-employee clearly within the provisions of the second subdivision of section 1816 of the Statutes of

1898. For some reason not very clear to us now, this distinct ground of negligence seems to have been ignored by the trial court. Neither party suggested any question specifically covering it, as a proper inquiry to be embodied in the special verdict. The court, in framing the verdict, submitted no question and gave no instruction which in any way referred to it. And now, upon appeal to this court, the appellant claims, in effect, that the issue was abandoned, while the respondent claims that the engineer's negligence was proven by uncontradicted testimony, and that it was unnecessary to submit the question to the jury. As to the claim that the issue was abandoned, we find no affirmative evidence in the record showing such abandonment, while, as to the claim that the issue was unmentioned in the special verdict because it was proven by uncontradicted testimony, it is to be observed that the form of the verdict itself indicates that the trial court was endeavoring to include every fact in the verdict necessary for a recovery, whether disputed or not; otherwise questions 1, 4, and 7, as to none of which was there any dispute, would not have been included. Again, while the court was careful to ask the jury, by the eleventh question, whether the failure to display warning signals was the proximate cause of the plaintiff's injury, he utterly failed to submit any such question as to the alleged negligence of the engineer, and also failed to mention the subject when instructing the jury upon the eleventh question.

So far as we can judge from the appearance of the record, the question as to the alleged negligence of the engineer was lost sight of during the trial, and has in fact never been tried, though as matter of fact it is the only ground of negligence, since the claim of defective machinery has been abandoned, upon which the plaintiff can base any claim for a recovery. Even were it to be conceded, which it is not, that the evidence conclusively establishes the negligence of the engineer, still there is no finding that such negligence was the proxi-

mate cause of the injury, while, on the other hand, there is a direct finding that the failure to give warning or signal was the proximate cause of the injury. This finding manifestly excludes another proximate cause. The plaintiff stands upon it. He has made no motion to amend the verdict, and clearly is in no position to now shift his ground and claim, in direct contradiction of the verdict, that there was another proximate cause, proven by uncontradicted evidence, upon which he can fall back and support his judgment. So there can be no affirmance on this latter theory. These questions should have gone to the jury, and the question as to the failure to give signals and whether that was the proximate cause of the injury should not have been asked.

Again, it is claimed by appellant that contributory negligence was conclusively proven, because the plaintiff did not sooner warn the engineer of their approach to the burned portion of the bridge. We cannot so hold. It appears by the rule introduced in evidence that the engineer is in exclusive charge and control of the engine, the fireman being subject to his orders. The testimony shows that it was expected that the engine would approach very close to the burned portion of the bridge, in order that the water in the tank might be used. It appears that the plaintiff asked a warning question of the engineer shortly before they reached the bridge, and received an answer indicating that the engineer knew his whereabouts and wished no advice. If, after this question and answer, the plaintiff waited without further remark, anticipating that the engineer would stop the engine close to the burned portion, the court cannot say that such waiting is contributory negligence as a matter of law. It was clearly a question for the jury.

Appellant claims, however, that question No. 9, with its answer, by which the jury found that the plaintiff on his second trip knew or ought to have known that there was no signal displayed at the bridge, is in effect a finding of con-

tributory negligence. It is evident that we cannot so hold. The considerations which we have just stated on the general subject of contributory negligence are essentially applicable here.

The appellant proposed a question for insertion in the special verdict, embodying the inquiry whether the fall of the engine was the result of a pure accident for which neither party was to blame. This question was rejected by the court, and we think rightly We have been unable to frame any reasonable hypothesis upon which a verdict of pure accident could be sustained.

The view we have taken of the case necessitates a new trial, for the reason that the real issue in the case has never been tried, and obviates the necessity of discussing the contentions made by the appellant that the answers to questions 11½, 14, and 15 are not sustained by the evidence. While we have not given specific treatment to each error claimed by the appellant, it is believed that we have discussed in a general way all the questions of any importance raised upon the appeal. It is evident that upon a new trial the issues will be much simplified, and the special verdict, if one be rendered, should be reduced to a very few questions, in accordance with recent decisions of this court.

By the Court.—Judgment reversed, and action remanded for a new trial.

WILBERT, Administratrix, Respondent, vs. CITY OF SHEBOYGAN, imp., Appellant.

March 24—April 19, 1904.

Municipal corporations: Streets: Death caused by defective insulation of lighting wires: Knowledge of defect: Duty of inspection: Pleading.

1. In an action against a city for death caused by defective insulation of electric lighting wires owned by a lighting company, by reason whereof the current passed into a guy wire so located that a person following the usual course of travel on the street was liable to come in contact with it, as plaintiff's intestate did, the complaint alleged that such condition was known to the city or had existed for so long a time before the accident that the city ought, in the exercise of ordinary care, to have known of and remedied the defect. *Held*, that the indefiniteness in the statement as to the length of time the defective insulation had existed did not render the complaint insufficient, but could be taken advantage of, if at all, only by motion.

[2. Whether, if it should appear that the alleged defect was discoverable only by an inspection by an electrician, the city could be held liable on the ground that it was its duty to make such inspection of the appliances of a lighting company occupying its streets, not determined.]

3. Upon demurrer, all reasonable inferences that can be drawn from the language of a pleading to support it are to be indulged in, rather than such as will defeat it.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover for the death of plaintiff's intestate, alleged to have been produced by the negligence of the defendants. The fault charged as to the city of *Sheboygan* is this: It permitted the Sheboygan Light, Power & Railway Company to use its streets for the maintenance of an electric lighting plant designed for public and private lighting. By the ordinance in that regard the city possessed the right to determine the manner in which poles, wires, and public lamps

should be placed, and their location. The lighting company was thereby required to guard, so far as practicable, against the escape of the electric current from the conducting wires, and not to place poles, guy wires, or posts so as to in any manner interfere with the free and convenient use of the streets for ordinary purposes, and to provide and maintain insulative resistance for all electric light circuits, of the standard efficiency, and to the approval of the board of public works of the city. One of the lighting company's poles, at a point described, with its connections, including a suspended arc lamp, feed wire, a supporting and guy wire, were unskilfully placed, and allowed to be out of repair, so that the electric current escaped from its proper pathway to the guy wire, which was so located that a person following the usual course of travel was liable to come in contact therewith, causing the electric current to travel from the guy wire by way of his body to the ground. About January 8, 1902, the deceased, while so traveling in the exercise of ordinary care, came in contact with such guy wire, whereby the electric current passed through his body to the ground, causing his death. The defects in the electrical appliances, permitting the escape of the electric current to the guy wire, were absence of insulation between the suspended arc lamp and its supporting wire, and absence of insulation between the point of attachment of the supporting wire and the post to which the guy wire was attached, which wire passed to a spud post, thence to a shade tree. The location of the guy wire was not such as to render the use of the traveled way for ordinary purposes dangerous, except for the condition of the electrical appliances mentioned, permitting it to become a pathway for the electric current from its proper channel to the ground. The lighting company violated the ordinance under which it obtained the privilege to use the streets of the city, and the city neglected its duty in not compelling compliance with such ordinance in that the guy wire was placed and per-

mitted to remain so that a person rightly using the traveled way was liable to come in contact therewith. The lighting company failed to comply with such ordinance as to insulating devices to prevent the escape of the electric current to the guy wire, and the city failed to enforce such compliance or otherwise remedy the unsafe condition of the street caused thereby. Such condition was known to the defendants, or had existed for sufficient time to enable the city, by the exercise of ordinary care, to know thereof and remedy the same before the occurrence complained of.

The complaint contained other allegations to the foregoing effect, and others, constituting a cause of action against the city if those as to its neglect to maintain the street in a reasonably safe condition for public travel are sufficient to show breach of duty in that regard. It demurred to the complaint for insufficiency. The demurrer was overruled and the city appealed.

For the appellant there was a brief by *T. M. Bowler,* and oral argument by *E. R. Bowler.* They contended, *inter alia,* that the complaint wholly fails to allege any facts upon which the city, using ordinary care, would be advised of any defects in the insulator, or that the defects might have been detected by the city officers or discovered in the ordinary course of investigation, or that they were so open or notorious that the city, through its officers, should have been advised of them and repaired them. It therefore fails to state a cause of action against the city. *Cooper v. Milwaukee,* 97 Wis. 458; *Duncan v. Philadelphia,* 173 Pa. St. 550; Elliott, Roads & S. (2d ed.) § 824; Joyce, Electric Law, § 243; *West Chester v. Apple,* 35 Pa. St. 284; *Hanscom v. Boston,* 141 Mass. 242; *Lobdell v. New Bedford,* 1 Mass. 153; *Reed v. Northfield,* 13 Pick. 94; *Doherty v. Waltham,* 4 Gray, 596; *Winn v. Lowell,* 1 Allen, 177; *Hodgkins v. Rockport,* 116 Mass. 573; *Crosby v. Boston,* 118 Mass. 71; *Whitehead v. Lowell,* 124 Mass. 281.

Simon Gillen, for the respondent, argued, among other things, that while the defendant city is not an insurer of the safety of its streets, in so far as its duty to inspect the appliances used by electrical companies therein are concerned, it is bound, for that purpose, to exercise ordinary care and diligence. The electrical use of the streets being by its license, it is charged with the duty of exercising ordinary care to see that its licensees do not, by negligence, make the streets unsafe for persons making lawful use of them, in the exercise of ordinary care and prudence, such care being governed by the dangerous nature of the licensees' use or means of use. Elliott, Roads & S. (2d ed.) § 824; *Twist v. Rochester,* 37 App. Div. 307, 5 Am. Neg. Rep. 403; *Mooney v. Luzerne,* 186 Pa. St. 161, 40 L. R. A. 811; 1 Thompson, Comm. Negligence, § 813.

MARSHALL, J. The liability claimed is predicated on the duty of the city in respect to its streets, created by sec. 1339, Stats. 1898. It does not seem to be contended by respondent's counsel that actionable fault of appellant is alleged except in that it is stated the latter knew or ought to have known of the defective insulation alleged, and remedied the same before the occurrence complained of. On the other hand it is not claimed by appellant's counsel but that, if the city was so circumstanced prior to such occurrence, it was actionably negligent. In that view it seems very little need be said in deciding the appeal. The allegations of the complaint are very specific as to the city's knowledge of the dangerous condition which caused the death of respondent's intestate, or negligence in not having such knowledge and removing such condition before such occurrence. True, the charge is that it knew or ought to have known of such condition and applied the proper remedy because a sufficient length of time therefor had existed before the accident; but that charges the existence of the fact essential to the city's liability most dis-

tinctly. If counsel for appellant apprehended there was fatal indefiniteness, because the length of time the defective insulation had existed was not stated, the remedy was by motion to make more definite and certain, not by demurrer.

It is suggested by appellant's counsel that the defect was such that knowledge thereof was obtainable only by inspection, and that the city owed no duty to the public in that regard; that it was warranted in relying on the lighting company to comply with the terms of its privilege to use the streets as regards insulating its appliances, till knowledge was brought home to it of a failure in that regard by some circumstance not involving any duty on its part to inspect the electrical appliances for defects. Whether that be so does not affect the case as it now stands. The allegations of the complaint are broad enough to enable respondent to establish liability of the city on counsel's view of the requisites thereof. It may be that when she comes to produce the evidence it will appear that the alleged defect was discoverable only by an inspection of the appliances by an electrician. If so, the position taken by appellant's counsel will have to be passed upon. On the other hand, the evidence may show the alleged defective condition of the insulation to have been reported to the city through its proper officers long before the death of the intestate, or that circumstances existed sufficient to charge it with constructive notice of the danger long before such occurrence, independently of whether it owed to the public the duty to inspect the appliances of the lighting company for defects. If it comes to the point where respondent must rely, to establish a cause of action, upon whether such duty existed under the circumstances, a very serious question will be presented for decision. We prefer to meet that after it shall have been passed upon by the circuit court. We see nothing in the record to indicate that such court has yet done that. No such question has been heretofore suggested here, though, as indicated by the authorities cited in the brief of appel-

lant's counsel, it is not entirely new. *Denver v. Sherret,* 88 Fed. 226; Joyce, Electric Law, § 243.

Possibly appellant appealed for the sole purpose of obtaining a decision on the question above suggested, assuming it was necessarily involved in the decision of the demurrer, since it might be inferred from the complaint that respondent's cause of action is dependent upon a solution thereof in her favor. If so, the assumption is wrong. All reasonable inferences that can be drawn from the language of a pleading to support it are to be indulged in, rather than such as will defeat it. *Miller v. Bayer,* 94 Wis. 123, 68 N. W. 869; *Benolkin v. Guthrie,* 111 Wis. 554, 560, 87 N. W. 466; *Thomson v. Elton,* 109 Wis. 589, 597, 85 N. W. 425; *Pfister v. Sentinel Co.* 108 Wis. 572, 580, 84 N. W. 887; *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 427, 84 N. W. 159.

The order appealed from must be affirmed.

By the Court.—So ordered.

STATE EX REL. GINN and others, Appellant, vs. WILSON and others, Respondents.

March 24—April 19, 1904.

Schools: Establishment of text-books: Powers of board: Contracts: Mandamus.

1. The duty of a board of education, imposed by the city charter, "to establish the text-books to be used" in the schools, is persistent and continuous; and the board cannot, certainly without express legislative authority, disable itself to perform such duty by contract or by resolution not to exercise its power for any given period.
2. The action of the board in the performance of such duty will not be dictated or controlled by courts, especially not by *mandamus.*

APPEAL from an order of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This case presents a continuation of the controversy, one aspect of which was considered in *Madden v. Kinney,* 116 Wis. 561, 93 N. W. 535, where many of the material facts are stated, as also the charter provisions for power of the board of education. In addition to the facts there stated, it appeared that on April 19, 1902, the board of education duly passed a resolution reciting the adoption of certain text-books by the resolution of July 30, 1901, and declaring such resolution to be rescinded. On August 26, 1902, the board, by resolution, established as text-books to be used in the public schools of said city certain other books covering the field of the geographies published by the relators and adopted by the resolution of July 30, 1901. Meanwhile, no steps having been taken to introduce or use in the schools the books of relators' publication, alternative writ of *mandamus* was issued upon petition of the relators, which was met by a motion to quash and also by a return, to which latter a demurrer was interposed. The parties appeared in court, and, as stated in the judge's opinion, submitted the whole question raised as upon a motion for judgment upon the pleadings. The court thereupon decided against the right of the relators to maintain *mandamus,* and accordingly ordered that the writ be quashed and that the motion for peremptory writ be denied, from which order the relators appeal.

For the relators there was a brief by *Giffin & Sutherland,* and oral argument by *D. D. Sutherland.* They contended, *inter alia,* that it is *res adjudicata* that the adoption and contract by the board in 1901 are valid. *Madden v. Kinney,* 116 Wis. 561. A subsequent board has no power to annul them without the consent of the parties in interest. *Home C. Co. v. Duncan,* 68 S. W. 15. *Mandamus* is the proper remedy, where school authorities fail to use books regularly adopted. *People ex rel. Weed-Parsons P. Co. v. Palmer,* 35

N. Y. Supp. 222; *State ex rel. Speer v. Baker,* 4 Kan. 379; *People v. Frost,* 32 Ill. App. 242; *Jones v. Board,* 88 Mich. 371; *State ex rel. Flowers v. Board,* 35 Ohio St. 368; *State ex rel. Clark v. Haworth,* 122 Ind. 462; *State ex rel. Snoke v. Blue,* 122 Ind. 600; *State ex rel. Roberts v. Board,* 74 Mo. 21; *Independent Dist. of Eden v. Rhodes,* 88 Iowa, 570; *People ex rel. Nat. C. Co. v. Dulaney,* 96 Ill. 503; *Milburn v. Comm'rs,* 112 Ga. 160, 37 S. E. 178; *People ex rel. Lighton v. McGuire,* 65 N. Y. Supp. 463; *Home C. Co. v. Duncan,* 68 S. W. 15.

For the respondents there was a brief by *J. M. Gooding,* attorney, and *Maurice McKenna,* of counsel, and oral argument by *Mr. McKenna.*

DODGE, J. The charter of Fond du Lac imposed on the board of education the duty to "establish the text-books to be used" in the schools. Thus was conferred a function distinctively legislative to act upon a question of policy of grave importance to the welfare of the community. The duty to exercise such function is persistent and continuous. At every moment of time it is the right of the public, and reciprocally the duty of the board, that they see to it that such text-books are established for use as that board, in reasonable exercise of judgment, believes to be for the general welfare. Of such a power and duty it cannot, certainly without express legislative authority, disable itself by contract nor by any resolution not to exercise it for any given period. *Goszler v. Georgetown,* 6 Wheat. 593; *Freeport W. Co. v. Freeport,* 180 U. S. 587, 21 Sup. Ct. 493; *Gale v. Kalamazoo,* 23 Mich. 344; *Waterbury & Co. v. Laredo,* 68 Tex. 565, 576, 5 S. W. 81; *Gaslight & C. Co. v. Columbus,* 50 Ohio St. 65, 33 N. E. 292; *Lord v. Oconto,* 47 Wis. 386, 2 N. W. 785; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326; 1 Dillon, Mun. Corp. § 97. The selection and establishment of school books being thus a purely legislative function which

the board is bound to exercise for the general good, there is no clear duty imposed by law to exercise it otherwise than in accordance with their judgment and discretion as to what public welfare requires. Such action will not be dictated or controlled by courts, especially not by *mandamus*. *State ex rel. Comstock v. Joint School Dist.* 65 Wis. 631, 27 N. W. 829; *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 81 N. W. 1046; *New Orleans W. W. Co. v. New Orleans,* 164 U. S. 471, 481, 17 Sup. Ct. 161. The decision of the trial court was clearly right.

By the Court.—Order affirmed.

IN RE MARCHANT'S ESTATE.

March 24—April 19, 1904.

Establishing heirship: Presumption of regularity: Construction of statutes: Failure to record order: When county court may determine who are heirs: Waiver of rights: Filing claim.

1. Notice was duly given that an application, under ch. 49, R. S. 1858, to establish heirship would be made to the circuit court on April 3, or as soon thereafter as counsel could be heard. The records of the court do not show that any proceeding was had in the matter on April 3, but show that the application was heard on May 17, at a sitting of the court during the term which commenced on April 3. The notice, with proof of publication, the required consent dated April 3, and the proper petition dated April 28, were filed on May 17, and the fact that the application was based on such papers, and their filing, are recited in the order dated May 17, establishing the heirship. *Held* that, the court having jurisdiction of the parties and the subject matter, it will be presumed that due proceedings were had at the time set by the notice, preparatory to the making of the order of May 17th.
2. The presumption in favor of the regularity of the proceedings of a court of general jurisdiction obtains in case of a proceeding under a special statute.

3. A statute providing for the establishment of heirships should be construed liberally to accomplish its object.
4. Failure of the court officers to enter at length upon the records, as required by the statute, an order establishing heirship, does not invalidate the order.
5. The county court may properly proceed to determine who are the heirs of a decedent, although the administration of his estate has not reached the stage of final distribution.
6. One whose rights as the established heir of a decedent under an order of court were disputed did not waive such rights by filing a claim for services rendered to the decedent, such claim being filed to protect him in case it should be determined that he had no interest in the estate as heir.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Respondent, *Anthony Marchant,* was born in 1851. His family name was Lantz. When four years old, Thomas Marchant and his wife attempted to adopt him under an arrangement with the board of supervisors of Fond du Lac county. He lived with them under this arrangement until his eighteenth year. The adoption proceedings were apparently irregular, and *Anthony* went to live with his mother, his father having meanwhile died. Two years later, when Thomas Marchant learned that *Anthony* planned to go West, he proposed and made an offer to *Anthony* to establish him as his heir if he would remain with him and his wife. After proceedings were taken to accomplish this purpose, *Anthony* returned to live with Thomas Marchant and his wife, and conducted himself as their son, working on the farm, caring for them in their illnesses, and attending to their burial. Proceedings were taken to make *Anthony* their heir under ch. 140, Laws of 1858. The proceedings prescribed by this chapter were followed in substantially all the requirements, except that the provision requiring the order to be recorded at length was not complied with until 1902, after the death of Thomas Marchant; and there is nothing in the record showing that on the day fixed for the hearing of the petition

any steps were taken, or that the proceeding was brought to the court's attention. In January, 1871, respondent caused the notice required by the statute to be published; stating that on April 3d, or as soon thereafter as counsel could be heard, application would be made to the circuit court for Fond du Lac county to establish him as the heir of Thomas Marchant. The written request of Thomas and Elizabeth Marchant that the petition be granted bears date April 3, 1871. The petition of *Anthony Lantz* was signed and dated April 28, 1871. On May 17th, during the same term of the court, these papers, with proof of the publication of the notice, were filed with the clerk of the court, and the court on that day made and signed an order declaring and establishing *Anthony Lantz* the heir of Thomas Marchant, under the name of *Anthony Marchant.*

Thomas Marchant died September 3, 1901, and on September 9th *Anthony* made application for appointment as administrator, and set forth that he was a son of the deceased. He was appointed administrator, and made an inventory of the estate. The court made an order limiting the time for the presentation of claims. On April 29, 1902, appellants, the brothers and sisters of Thomas Marchant, filed a notice in the probate proceeding, claiming to be the next of kin to Thomas Marchant and his heirs at law, and asking that their rights be considered in the final distribution of the estate. The time for the filing of claims against the estate was extended, and *Anthony* filed a claim for $10,645.74. His daughter also filed a claim.

On July 2d, *Anthony* filed a petition praying that the court proceed to ascertain who were the heirs of Thomas Marchant; and the court, by order, set a time for such hearing and directed that notice be given to appellants of such hearing. Pursuant to the order of the probate court, a hearing was had on the fifth Tuesday of July, 1902. Upon the hearing had at that time, the court found that *Anthony Marchant*

was the sole heir at law of Thomas Marchant, deceased. From this order the brothers and sisters appealed to the circuit court, where the order was affirmed. They now appeal from the judgment of the circuit court affirming the order of the county court.

For the appellants there was a brief by *Barbers & Beglinger,* and oral argument by *Fred Beglinger.*

For the respondent there was a brief by *Maurice McKenna,* attorney for *Anthony Marchant* in his individual capacity, and *Giffin & Sutherland,* attorneys for him in his capacity as administrator, and oral argument by *Mr. McKenna* and *Mr. D. D. Sutherland.*

SIEBECKER, J. The respondent, *Anthony Marchant,* claims to be the legal heir of Thomas Marchant, by virtue of a proceeding under ch. 49, R. S. 1858, prescribing the procedure for establishing heirships. This statute provided that the heirship of any person might be established by an order of the circuit court of the county wherein the person resided, upon petition setting forth the reasons for the application. It also provided that, before such an order be made, the written consent of the person, the heirship to whose property was to be established, as well as the petition, should be filed in the office of the clerk of the circuit court, and that the order should be entered upon the record of the court. It further provided that the petition must be accompanied by a copy of the notice of such application, and that the notice contain the substance of the petition, and that it give the time and place of such application.

From the foregoing statement of facts, it appears that an application was made by respondent to be established the heir of Thomas Marchant, under this law. It is now contended that the proceeding is void upon the ground that the records of the court fail to show that the application was presented or that any other proceeding in relation thereto was

had before the court on April 3, 1871, the time fixed in the published notice for the hearing of the application. The entry on the court's record shows that the application was heard on May 17, 1871, at a sitting of the court during the term which commenced on April 3d. The notice, with accompanying proof of publication, the duly executed written consent of Thomas and Elizabeth Marchant, bearing date April 3, 1871, and the petition of *Anthony Lantz,* dated April 28th, were filed with the clerk of the court on this day. An order bearing date May 17, 1871, recites that the application was made upon the petition, the written consent, the notice, and the proof of publication, and the filing of these papers with the clerk of the court, and declares that *Anthony Lantz* is thereby established the rightful heir at law of Thomas and Elizabeth Marchant. The main objection to the validity of the proceeding is the absence of any entry in the clerk's minutes of any proceedings had in the court on April 3, 1871, the time fixed by the notice when such application would be made.

There is no question but that the court had jurisdiction of the subject matter of the application, under the notice, and that it was set for hearing before the proper court and at a time and place contemplated by the statute. Under this state of facts, it is presumed that due proceedings were had at the time for which the proceedings were noticed, preparatory to the making of the order of May 17th. There is nothing showing that the court lost jurisdiction in view of this presumption sustaining the regularity of its proceedings. As stated in *Falkner v. Guild,* 10 Wis. 563:

"The proceedings were in a court of general jurisdiction; and the general rule in respect to such courts is, at all events where jurisdiction appears, that, though the record does not show everything necessary to regularity, it is to be presumed unless the contrary expressly appears."

It is, however, argued that this rule cannot avail the par-

ties to this action, because this was a proceeding under a special statute. This subject was also considered in *Falkner v. Guild, supra,* and the court declared:

"It is true that the proceedings under special statutes have sometimes been made an exception to this general rule as to the presumption, even in courts of general jurisdiction. But without entering into the inextricable labyrinth of cases on the subject, we will only say that we can see, upon principle, no reason for the distinction. The general presumption in favor of the regularity of the proceeding of such courts is founded on the character of the court itself. And that character is the same, whether it is under a special statute or under the common law. I cannot see that a difference in the source of its authority to act can make any rational distinction as to the presumption in favor of the regularity of its action."

Another consideration submitted upon the question is that the statutes are, in their nature and effect, derogatory of the common law and should therefore receive a strict construction. The subject matter of the statute, as well as the proceedings which persons must follow to avail themselves of its provisions, are kindred to and like those for the adoption of children. This kinship received marked recognition in legislation in different instances embodying provisions covering both subjects in one statutory enactment. The adjudications pertaining to these subjects have given these statutory enactments a liberal construction to accomplish their objects. The trend of the decisions is that these laws are designed to foster the best interests of the parties who wish to assume the close relationship they seek to guard and establish, "and no narrow construction should be indulged in that will tend to defeat a result so obviously intended and in every way beneficial."

We are led to the conclusion that the record shows that the court had jurisdiction of the parties and the subject matter on the day set by the notice, namely, April 3, 1871, and that the order of May 17th, at the same term of the court, was

made upon due proceeding preparatory thereto. *Falkner v. Guild, supra; Platt v. Robinson,* 10 Wis. 128; *Allen v. Beekman,* 42 Wis. 185; *Voelz v. Voelz,* 88 Wis. 461, 60 N. W. 707; *Parsons v. Parsons,* 101 Wis. 76, 77 N. W. 147; *Nugent v. Powell,* 4 Wyo. 173, 33 Pac. 23; *In re Johnson's Estate,* 98 Cal. 531, 33 Pac. 460; *Barnard v. Barnard,* 119 Ill. 92, 8 N. E. 320; *Pierce v. Strickland,* 26 Me. 277.

It is further contended that, since the order was not spread upon the record of the court as prescribed, it was inoperative and void. The argument assumes that the act of recording was a necessary step in establishing the heirship. The requirements of the statute do not contemplate the entry of the order as a necessary condition precedent to the completion and validity of the proceeding for the establishment of an heirship. When the court announced its determination, and signed the order incorporating its decision upon the application, it became an effectual and final decree, and established the legal rights of the parties; and an omission of the ministerial duty of the court's officers to enter the order at length upon the records cannot be invoked to the prejudice of the parties, nor does it invalidate the order or decree of the court. *Abney v. De Loach,* 84 Ala. 393, 4 South. 757; *Nugent v. Powell, supra.*

It is claimed that the county court's action in determining who are the heirs of Thomas Marchant is premature, since the administration had not been carried to the point of distribution. We can conceive of no good reason why the county court could not properly proceed to determine this question before the administration had reached the stage for a final distribution of the estate. In this instance all the parties interested in the question have appeared in the proceeding upon order and due notice, and full opportunity to hear and try this controversy has been given, and a full and complete trial of this question has taken place, and a determination based upon a proper procedure of the county court has

been made, and it must be deemed conclusive upon the appellants.

It is urged that respondent waived his rights as the established heir by filing a claim against the estate for the value of his services rendered to the deceased. We can see no good reason for holding that such action should constitute a waiver of his legal rights as the established heir. The claim, no doubt, was filed to protect him in his rights if it should be determined that he had no interest in the estate as such established heir, and his act of filing a claim is referable to such a contingency, without operating to the prejudice of his other rights.

It must follow that respondent is the legally established heir of Thomas Marchant, deceased, and must be so regarded upon the final distribution of the estate.

By the Court.—Judgment affirmed.

ZIEGLER, Appellant, vs. BARK and others, Respondents.

March 25—April 19, 1904.

Guardian and ward: Incompetent person: Sufficiency of petition: Notice: Presence of incompetent in court: Guardian ad litem: *Appeal: "Person aggrieved:" Jurisdiction: Validity of agreements.*

1. A petition for the appointment of a guardian for an incompetent person is not insufficient to give the county court jurisdiction to proceed in the matter merely because it fails to state the names of the persons who would be affected by such appointment, and fails to show with whom the alleged incompetent resides and who is in possession of her property.
2. Where notice of the time and place for hearing such petition was given to the alleged incompetent by personal service and to all other persons by publication, in compliance with the statute and the order of the court, it was not essential to the jurisdiction that personal service should have been ordered or made upon the son with whom she resided and who had control of her property, or upon her other children.

3. Where the alleged incompetent was personally present in court during the hearing, it is immaterial that the order for such hearing did not require that, if able to attend, she be produced before the court.
4. On the hearing of a petition for the appointment of a guardian for an alleged incompetent person, the county court appointed a guardian *ad litem* for her, and, she having been adjudged incompetent and a guardian appointed, the guardian *ad litem* appealed on her behalf to the circuit court. *Held*, that such appeal gave the circuit court jurisdiction.
5. A son of the alleged incompetent person who had possession of all her property under an assignment or transfer from her, was a person aggrieved by the order and judgment of the county court appointing the guardian, and hence was entitled to appeal therefrom.
6. Upon the appeal in such case the circuit court had no authority to adjudge the validity of the agreement between the alleged incompetent and her son, whereby her property was transferred to him and he agreed to provide for her support,—an action brought by her to set aside such agreement being then pending.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This is an appeal from a judgment reversing the order and judgment of the county court appointing a guardian of the person and estate of *Eleanor Bark,* who was alleged to be mentally incompetent. It appears from the record and is undisputed that Alfred Bark, the husband of *Eleanor Bark,* died October 14, 1896, leaving, him surviving, his widow, *Eleanor,* and eleven children, all of whom were of age, and a farm of eighty acres of land adjoining the city of Lancaster, on which he resided at the time, and another farm of 320 acres in the country. The two farms were together valued at $12,600, and he had personal property of the value of $2,834.88, consisting of stock, machinery, produce, and property on his home farm, and claims against some of his children. Five days after the death of Alfred, the widow and the eleven children, after full conference, deliberately entered into a written agreement (Exhibit A) under seal,

wherein and whereby it was mutually agreed, in effect, that the real estate should be kept together and undivided during the life of the widow; that the income therefrom should be applied to the payment of debts and taxes, and making repairs, and the expenses of administration, and the remainder should be paid to the widow during her natural life, out of which the widow was to maintain a home on the eighty acres for herself and her daughter Effie so long as she remained unmarried. Provision was also made therein for Effie, who was weak-minded, in case she survived her mother. It was further agreed therein that the son John H. should be appointed administrator of his father's estate, and as such, and as agent for the widow and the other ten children, should reside with his mother on the homestead, and manage and run the same and all the lands and business pertaining to the estate, and should receive compensation for his services, including all commissions as administrator—$20 per month—with the privilege of having one horse of his own on the farm, to be used as one of the farm team. John H. was thereupon appointed such administrator. He was unmarried, and acted as such administrator and agent up to the time of his death, March 25, 1901. He had not closed up the estate of his father when he died, but it appears from the subsequent settlement thereof by the administrator *de bonis non* that the estate was indebted to him when he died in the sum of $175.80. John H. left a will whereby his share of the estate passed to his sister Jennie and his two brothers, Addison A. and *James J.*

Upon the death of John H. the widow was left alone on the homestead, as her daughter Effie had previously been sent to an asylum, and subsequently a conference was had by the children and their mother, who was aged and infirm, as to her care and maintenance and the estate. The result was a written contract, under seal, executed by the widow, *Eleanor,* and the son *James J.,* in the presence of five of the other children, who signed the same as witnesses April 10,

1901. That contract is designated as Exhibit B, and recites the substance of the former contract (Exhibit A) with John H., his action as administrator and agent in carrying out that contract, the necessity of a home for the widow, and an administrator *de bonis non* of Alfred's estate, and the settlement of the same; and it was therein agreed between *Eleanor* and *James J.* that the latter should assume the care and management of such real estate, collect all rents and income therefrom, and out of the same he should pay all taxes and repairs thereon, keep the real estate in good condition, provide a comfortable support in sickness and health for *Eleanor,* and pay the expenses of her burial and all debts; and *Eleanor* thereby sold, assigned, and transferred to *James J.* all of the live stock, farm produce, farm machinery, money, and household furniture and goods then in her possession; the proceeds of the sale of personal property to be used in payment of outstanding debts. As compensation for his services, it was therein agreed that *James J.* should retain as his own all of the income from said property after making the payments above mentioned. It was therein agreed that such contract should be binding upon the parties during the life of *Eleanor.*

At the time of the death of John H., *James J.* lived, with his wife and children, in Minnesota, but in pursuance of the agreement (Exhibit B) he moved with his family onto the homestead at Lancaster with his mother. A few weeks afterwards *Eleanor* began to be dissatisfied, and took counsel with other children and lawyers. October 24, 1901, *Eleanor* verified a written complaint in her own name against her son *James J.,* alleging, in effect, that her signature to the agreemen (Exhibit B) had been procured by undue influence, and at a time when she did not comprehend its contents, and that she had been ill-treated by *James J.* in the previous August and September. The summons and complaint in that action were served on *James J.* October 26, 1901. October 25,

1901, *Eleanor* filed a claim in her own name for $2,057.50 against the estate of her son John H.

October 31, 1901, the daughter *Mary B.*, of Nebraska, filed her petition in the county court for the appointment of David Schreiner as guardian of the person and estate of *Eleanor*, on the ground that she had personal estate of the probable value of $2,000, and rights in real estate with an annual income of $700, and that, by reason of extreme old age and mental and physical incapacity, she was mentally incompetent to have the charge and management of her property. Upon the same day the county court made an order for the hearing of such application, and for the personal service of a copy of the order on *Eleanor*, and publication of the same. Such service and publication were duly made, as appears from proofs in the record. On the hearing, December 3, 1901, *W. J. Brennan* was appointed guardian *ad litem* for *Eleanor* by the county court; and thereupon, and after hearing the testimony and examining the facts, the county court found, as matter of fact, in effect, that *Eleanor* was mentally incompetent to have the charge and management of her property, and incapable of taking care of herself and managing her property, and that she asked for the appointment of such guardian; that her personal property exceeded $1,000; and that David Schreiner, of Lancaster, was a competent and suitable person to be so appointed as such guardian—and thereupon adjudged and decreed accordingly.

From that order and judgment *James J.* and the said guardian *ad litem*, in behalf of the said *Eleanor*, appealed to the circuit court. After hearing the testimony and arguments of counsel, that court found as matters of fact, in effect, the making of Exhibit B, April 10, 1901, and its provisions; that *James J.* immediately after the execution of that agreement went into the possession of all the property, real and personal, of said *Eleanor*, under that agreement, and had been in such possession ever since; that said agreement was

a valid and binding contract between the parties thereto; that *Eleanor* had no other property, real or personal, than such as she conveyed by that instrument; that at all times since the execution of that agreement, when *Eleanor* was at his home, *James J.* has comfortably provided for her in sickness and in health, and both he and the members of his family have treated her with kindness; that no reason exists why a guardian should be appointed over her property, and that no reason exists why a guardian should be appointed for the person of such *Eleanor;* that said *Eleanor* made no complaint of any ill treatment at the home of *James J.* by him or by the members of his family; that she stated in open court that she did not want to have a guardian appointed over her; that *Eleanor* was mentally competent to have the management of her person, and also mentally competent to have the management of her property. And as conclusions of law the circuit court found, in effect, that the order of the county court adjudging *Eleanor* mentally incompetent, and appointing David Schreiner as guardian of her person and estate, be reversed; that no guardian should be appointed over her; that the costs and disbursements of the proceeding should be paid by the petitioner, *Mary B. Ziegler;* that this case be remitted to the county court for further proceedings in accordance with the decision and order of the circuit court. From the judgment entered thereon accordingly, the petitioner, *Mary B. Ziegler,* brings this appeal.

For the appellant there was a brief signed by *Bushnell, Watkins & Moses,* and oral argument by *A. R. Bushnell.* They argued, among other things, that a guardian *ad litem* ought not to have been appointed by the county court. One proceeded against under the statute as an insane or incompetent person may defend and appear by attorney, until adjudged insane or incompetent. *Appeal of Royston,* 53 Wis. 612. If one may defend in person and by attorney, a guardian *ad litem* for such person is improper. To appoint a

guardian *ad litem* in this proceeding is to anticipate and determine beforehand the very subject matter of the inquiry involved.

For the respondents there was a brief by *Lowry & Carthew,* attorneys for respondent *Bark,* and *W. J. Brennan,* guardian *ad litem,* and oral argument by *Harry E. Carthew.* They contended, *inter alia,* that the petition for guardianship was not sufficient to give the court jurisdiction because it failed to set out the persons who would be affected by such appointment, and because it failed to show with whom the alleged incompetent resided and who was in possession of her property. Sec. 3976, Stats. 1898; Gary, Probate Law, § 787; *In re Bassett,* 68 Mich. 348, 36 N. W. 97; *In re Myers,* 73 Mich. 401, 41 N. W. 334; *Partello v. Holton,* 79 Mich. 372, 44 N. W. 619; *Munger v. Probate Judge,* 86 Mich. 363, 49 N. W. 47; *Appeal of Royston,* 53 Wis. 617. No jurisdiction was obtained, because the order failed to require personal service upon said persons. See cases cited above. The appearance of the alleged incompetent cannot give jurisdiction or waive any of her rights. *Appeal of Royston, supra; North v. Joslin,* 59 Mich. 624.

CASSODAY, C. J. 1. It is claimed by the respondents that the county court never obtained jurisdiction to appoint a guardian, for the reason that the petition therefor failed to state the names of the persons who would be affected by such appointment, and because it failed to show with whom the alleged incompetent resided, and who was in the possession of her property. The statute required the verified petition to be made by a relative or friend of the alleged incompetent, and to state the fact of such incompetency. Sec. 3976, Stats. 1898. Here it was made by a daughter of the alleged incompetent. The petition is quite general in its statement of facts, but seems to comply with the provisions of that section. *Appeal of Royston,* 53 Wis. 612, 617, 618, 11 N. W.

36. In that case it was said to be the better practice for the petition to state the name of the person with whom, if any one, the supposed incompetent is living; who are his relatives, if any; what his estate consists of, and who has charge of it—so that the county court may act with full knowledge of those interested in the welfare of the incompetent and his estate, and may cause notice to be given to them of the application, if it shall deem such notice necessary or proper. But in that case the court refrained from holding "that a petition which fails to contain these matters is not sufficient, under the statute, to give the court jurisdiction to proceed in the matter." Id. The only object of stating in the petition the facts said to have been omitted would be to inform the court of the names of such persons, so that by notification their presence could be secured at the hearing. Here it appears from the record that *James J.*, the son of *Eleanor*, and the person with whom she resided at the time, and who claimed to be in the lawful possession of all the property belonging to *Eleanor*, appeared in the county court at such hearing, and moved to dismiss the proceeding for want of jurisdiction. A more complete petition could not have secured a more full hearing.

It is also claimed by the respondents that no jurisdiction was obtained by the county court, because service was never made on the alleged incompetent as required by the order, and because the order failed to require personal service upon the person having control of her person and property, and her children, and because no such service was ever made, and because the order did not require that the alleged incompetent, if able, attend before the court at the hearing. The statute cited required the county court to "cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than twenty days before the time so appointed, and shall also cause such person, if able to attend, to be produced before him on the hearing." Sec. 3976, Stats. 1898. Here it appears from the

record that, on the day the petition was so filed in the county court, that court did make an order fixing the time and place of the hearing, as so required by the statute; and it was therein further ordered that notice thereof be given to *Eleanor Bark* by personal service upon her of a copy of that order at least twenty days before such hearing, and to *all other* persons interested by publishing a notice of the order for three successive weeks prior to the day of the hearing in a newspaper therein designated. The proof in the record is that such personal service of such copy was made on *Eleanor* November 7, 1901, and on the same day *Eleanor* signed a written admission of such service. The affidavit of the printer of the newspaper so designated, in the record, shows that notice of such hearing was published in such newspaper for three weeks successively, commencing November 7, 1901. It moreover appears from the findings of the county court that *Eleanor Bark* was personally present in court during such hearing. The requirements of the statute seem to have been fully complied with, and we perceive no ground for holding that the county court was without jurisdiction.

2. Counsel for the appellant contends that the county court was without authority to appoint *W. J. Brennan* guardian *ad litem* for *Eleanor* December 3, 1901, and that the appeals from the order and judgment of the county court taken by him and *James J.* were together insufficient to give the circuit court jurisdiction. A rule of the county court provides that "infants, insane persons and other persons under disability, shall appear and prosecute and defend by their guardians *ad litem* who shall be some such attorney, or by their general guardians." County Court Rule III, sec. 1. If *Eleanor* was at the time under disability, as adjudged by the county court, then a guardian *ad litem* was properly appointed. As said by Mr. Justice TAYLOR in the case cited:

"We can see no reason why a man who is proceeded against as an insane or incompetent person, under the statute, is not the proper person to defend against the proceeding; and,

until he is finally adjudged to be insane or incompetent, he may appear by his attorney, as any other person." *Appeal of Royston,* 53 Wis. 612, 625, 11 N. W. 36, 41.

Here the notice of appeal given by such guardian *ad litem* recites his appointment, and "that said *Eleanor Bark* is aggrieved by the order and judgment made by the said county court in said matter, . . . and that she desires to appeal therefrom, and, being himself aggrieved at said order and judgment, hereby appeals therefrom to the circuit court for said county." We are constrained to hold that the appeal so taken was effectual to give the circuit court jurisdiction. Besides, there can be no question but what *James J.* was aggrieved by such order and judgment, because it gave to the guardian so appointed the right to contest the claim which *James J.* made to the property which he held by virtue of an assignment and transfer from his mother. Such being the fact, there seems to be no doubt of the right of *James J.* to appeal from such order and judgment to the circuit court, as he did. Sec. 4031, Stats. 1898.

3. This brings us to the merits of the controversy. The conclusions reached by the circuit court were manifestly based upon the findings that the agreement made by and between *Eleanor* and *James J.* April 10, 1901, was a valid and binding contract between the parties thereto; that by that instrument *Eleanor* had transferred and conveyed all of her property, real and personal, to *James J.,* who had taken and held possession thereof ever since. If that agreement is a valid and binding contract between the parties thereto, and such transfer and conveyance is conclusive as against *Eleanor,* then it is very obvious that she would have nothing left, except an agreement for support, which might not necessitate the appointment of a guardian of her estate so long as she was kindly treated and properly supported. But had the circuit court authority in this proceeding to prejudge the validity and binding effect of that contract, and the conclusiveness of such transfer and conveyance? We are forced

to the conclusion that that court had no such authority. On the contrary, some days before the petition was filed for the appointment of such guardian, *Eleanor* had commenced an action in her own name against *James J.* to have that agreement set aside on the ground that the same had been procured by undue influence. For aught that appears, that action is still pending and undetermined. The mental condition of *Eleanor* did not prevent her from commencing that action in her own name. *Menz v. Beebe,* 95 Wis. 383, 70 N. W. 468. The day before commencing that action, *Eleanor* filed a large claim against the estate of her son John H. That claim involved the inquiry whether the agreement made October 19, 1896, between *Eleanor* and her eleven children, including John H., had been performed. That agreement is referred to as the basis of the agreement of April 10, 1901. The question here is not whether such claims or those agreements, or either of them, are valid and binding upon the parties, but whether *Eleanor,* "by reason of extreme old age or other cause, is mentally incompetent to have the charge and management of her property" in the condition described, within the meaning of the statute. Sec. 3976, Stats. 1898. This section has recently been construed by this court, and repetition is unnecessary. *In re Streiff,* 119 Wis. 566, 97 N. W. 189; *Schramek v. Shepeck,* 120 Wis. 643, 98 N. W. 213. The claims and rights of action thus made by *Eleanor,* or in her behalf, may be without foundation; but we have no right to assume that they are unfounded, on this application for the appointment of a guardian. We must hold that the finding of the circuit court that *Eleanor* was mentally competent to have the management of her property is against the clear preponderance of the evidence.

By the Court.—The order and judgment of the circuit court is reversed, and the cause is remanded with direction to affirm the order and judgment of the county court.

RULE, Appellant, vs. J. L. GATES LAND COMPANY, Respondent.

March 25—April 19, 1904.

Contracts: Fraud: Issues: Pleading: Amendment to conform to facts proved: Appeal.

The issues, upon the pleadings, were whether defendant's agents made a certain agreement with plaintiff, and whether they had authority to bind defendant thereby. The court found that they made the agreement, but that they were induced to do so by plaintiff's false statements. It rendered judgment for defendant without passing upon the question of the agent's authority. The finding of fraud was amply sustained by the evidence, which was introduced on both sides without objection. *Held*, on appeal, that this court will, in support of the judgment, consider the pleadings as having been amended to conform to the facts proved.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action to recover agent's commission upon the sale of real estate. The complaint alleged, in effect, that the defendant is a corporation engaged in the business of selling lands, and that the firm of Manning & Sabin are and have been its agents at Ladysmith, Wisconsin, with authority to sell land for the defendant and to employ subagents to sell land for the defendant; that in August, 1902, the plaintiff induced two persons named Grunow and Gruber to go with him to Dakota and northern Wisconsin with a view to purchase land from other companies, and that in course of the trip they came to Ladysmith August 13, 1902, and while there the firm of Manning & Sabin, learning that the plaintiff had with him two prospective purchasers of land, orally agreed, on behalf of the defendant, with the plaintiff that if the plaintiff would give them (Manning & Sabin) the names of said prospective purchasers, and leave them at Ladysmith, and cease trying to sell to them the lands of others, and re-

turn home, the defendant would pay the plaintiff ten per cent. of the purchase price of any lands which Grunow and Gruber might purchase of the defendant. The complaint further alleges full performance of this agreement on the plaintiff's part, and that Grunow and Gruber thereafter purchased from the defendant 440 acres of land at $10 per acre, and paid for the same, whereby $440 became due the plaintiff under said agreement.

The answer admits that Manning & Sabin were the defendant's agents at Ladysmith, but denies that they had authority to appoint subagents, and further denies that the plaintiff brought Grunow and Gruber to Ladysmith, but alleges that they came of their own motion and bought said 440 acres of land, and that plaintiff had nothing whatever to do with such sale, but did everything in his power to induce the purchasers to buy other land. The answer further denies at length the agreement set forth in the complaint, and denies that the defendant ever ratified the same.

The action was tried before the court, the jury being waived, and the court found the facts to be as follows:

"1. That in the early part of August, 1902, the plaintiff induced one Herman Grunow and one Charles Gruber, of Mifflin, Iowa county, Wisconsin, to go with him to Shell Lake, Wisconsin, to look at some lands belonging to the Central Minnesota Land Company, of which the plaintiff was the agent. The plaintiff purchased round-trip tickets from Dodgeville to Shell Lake and return, and under the agreement that, if the said Grunow and Gruber purchased lands from said Central Minnesota Land Company, the amount of the tickets was to be deducted from the purchase price of such lands, but that, if they did not purchase lands from that company, they were to refund to the plaintiff the amount that he paid for said tickets.

"2. That the plaintiff showed the said Grunow and Gruber some lands belonging to the Central Minnesota Land Company in the vicinity of Shell Lake. That they were not satisfied to purchase, and did not purchase, any of said lands.

That the said Grunow and Gruber had, before they left Mifflin, received from an agent of the defendant certain advertising matter in reference to the lands of the defendant, situated near Ladysmith. That the said Grunow and Gruber informed the plaintiff at and near Shell Lake that they were going down to Ladysmith to look at some lands belonging to the defendant, and accordingly they went to Ladysmith on their own account to look at such lands. They rode from Shell Lake to Cameron Junction in this state upon the said tickets which the plaintiff had purchased, but that they (the said Grunow and Gruber) paid their own fare from Cameron Junction to Ladysmith. That the plaintiff accompanied said Grunow and Gruber from Shell Lake to Ladysmith on his own account and without any request from the said Grunow and Gruber. That they all arrived at Ladysmith in the night and put up at the hotel. That the next morning, early, the said Grunow and Gruber, of their and on their own account, went to the office of the defendant in Ladysmith. That the same was not open at that hour, and that they returned to the hotel. Later in the day they went to the office of the defendant on their own account, and subsequently purchased 440 acres of land from the defendant at $10 an acre, amounting in the whole to $4,400.

"3. That the plaintiff informed W. S. Manning, one of the persons in charge of the office of the defendant at Ladysmith, and one of the agents of the defendant for the sale of its land, that he had brought the said Herman Grunow and Charles Gruber there for the purpose of buying lands, and that, relying on such statement, the said Manning then agreed to pay plaintiff ten per cent. on all lands that the persons that he brought there purchased from the defendant, where the price was less than $10 an acre, and $1 per acre where the price was more than $10 per acre.

"4. That the said statement so made by plaintiff to said Manning, that he had brought said Grunow and Gruber to Ladysmith for the purpose of buying land, was not in fact true. On the contrary, they went to Ladysmith to see about buying lands in consequence of having received the said advertising matter of the defendant, as aforesaid, before they left Mifflin. That in fact the defendant had nothing to do in inducing the said Grunow and Gruber to buy said lands, or

with the sale of said lands by defendant to said Grunow and Gruber. That they did not purchase said lands through any efforts of the plaintiff, and that plaintiff did nothing to bring about such purchase. That the plaintiff afterwards demanded from the said Grunow and Gruber the amount he had paid for the tickets aforesaid, and thereupon the said Grunow and Gruber repaid him such sum before the commencement of this action."

Upon these facts the court dismissed the complaint, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Fiedler & Fiedler,* attorneys, and *Aldro Jenks,* of counsel, and for the respondent on that of *Spensley & McIlhon.*

WINSLOW, J. The issues presented by the pleadings in the case were, in substance: (1) Whether Manning & Sabin made the agreement with the plaintiff alleged in the complaint; and (2) whether they had any authority to bind the defendant by such an agreement. The court found that the agreement was made by Manning & Sabin, but that it was induced by a false representation of fact made by the plaintiff, and hence that plaintiff was not entitled to recover thereon, and rendered judgment for the defendant without passing upon the question of the authority of Manning & Sabin to bind the defendant by such agreement. The plaintiff truly says that the pleadings did not present the issue of fraud in the making of the agreement, and he argues that the judgment should be reversed because the real issues in the case have not been disposed of.

The findings of the court are amply sustained by the evidence, and there can be no doubt that, if the plaintiff represented that he had brought the prospective purchasers to Ladysmith for the purpose of buying land, when in fact he had nothing to do with their coming, and the contract to pay him ten per cent. of the price of all lands which they bought of defendant was made in reliance on the truth of such state-

ment, then the contract is vitiated by the materially false statement or representation on which it was based. While this issue was not clearly presented by the pleadings, all the testimony *pro* and *con* was introduced without objection. The issue seems to have been fully tried by the parties, and all the evidence possible on the subject introduced. It would doubtless have been entirely competent for the court to have made the proper amendment to the pleadings so as to conform to the facts proved. In such case, upon appeal, this court will consider that to have been done which ought or properly might have been done below, if it be necessary to support the judgment. *Deuster v. Mittag,* 105 Wis. 459, 81 N. W. 643.

By the Court.—Judgment affirmed.

KITTOE, Appellant, vs. WILLEY and others, Respondents.

March 25—April 19, 1904.

Deeds: Delivery to third person: Intent: Husband and wife.

1. The manual deposit of a deed with a third person, to receive and hold for the grantee, with intent thereby to give the paper effect as a deed and to place the same beyond the custody and control of the grantor, will give such deed validity and efficacy as against the grantor, although some condition is imposed, precedent to final delivery to the grantee, which may serve to prevent vesting of actual title in him meanwhile.
2. Though the intent to make effective delivery is less readily inferred when a bedridden man hands to his wife a deed to another person, yet, if the necessary intent to place the instrument out of his control for the benefit of the grantee exists, the deposit with the wife is as effective as with a stranger.
3. The question of the intent of the grantor in delivering a deed to another than the grantee is one of fact, to be determined from all the circumstances surrounding the transaction.

APPEAL from a judgment of the circuit court for Grant county: E. RAY STEVENS, Judge. *Affirmed.*

Action of ejectment by plaintiff, one of ten heirs of John Willey, deceased, against the other nine heirs as defendants, but especially against *William H. Willey,* who claims to own eighty acres of land by virtue of a warranty deed executed by the ancestor, John Willey, in his lifetime. Similar deeds of other parcels of land were made to three other brothers at the same time. The only question was whether such deeds were delivered so as to become effective. As a result of some conflict in evidence, the trial court found that these deeds were executed by John Willey and his wife, witnessed, and acknowledged, about January 4, 1896, whereupon, in the presence of the scrivener and the witnesses, John Willey said to his wife: "Now mother, you keep them [the deeds] in your possession as long as you live, and then give them or deliver them to the boys." The whole transaction was without the knowledge or co-operation of the grantees named. John Willey died January 22d, whereupon Mrs. Willey informed the sons of the deeds, and in the presence of some of them deposited them with the cashier of a bank, with directions to deliver them to the named grantees upon her death. Shortly after her death, which occurred June 23, 1896, that cashier handed the deeds to the respective grantees. Upon the delivery to him of the deed, the defendant *William H. Willey* entered upon, and ever since has occupied and claimed title to, the eighty acres in dispute.

From these specific facts and some others the court found that the grantor, John Willey, parted with all control and dominion over the deeds at the time he delivered them to his wife. Judgment dismissing the complaint was entered, from which the plaintiff appeals.

For the appellant the cause was submitted on the brief of *Geo. B. Clementson,* who contended, *inter alia,* that the whole transaction of deeds and instructions is evidently an ineffectual will, which would have been revocable at pleasure had it been effectual. The instrument was evidently intended to

become operative only upon the death of both grantors, is testamentary in character, and not a deed. *Bigley v. Souvey,* 45 Mich. 370; *Blackman v. Preston,* 123 Ill. 381; *Donald v. Nesbit,* 89 Ga. 290; *Hazleton v. Reed,* 46 Kan. 73; *Nichols v. Emery,* 109 Cal. 323; *Leaver v. Gauss,* 62 Iowa, 314; *Turner v. Scott,* 51 Pa. St. 126; *Schuffert v. Grote,* 88 Mich. 650; *Clay v. Layton,* 96 N. W. 458; *Frederick's Appeal,* 52 Pa. St. 338; *Rawlings v. McRoberts,* 95 Ky. 346; *Millican v. Millican,* 24 Tex. 426; *Gage v. Gage,* 12 N. H. 371. Whether a deed has been delivered or not depends on whether the grantor parted with all power, dominion, and right of control over the deed when he put it into the hands of a third person. Where there is no question of estoppel, the grantor's *intention* to part with control over the deed cannot avail the grantee where no act has been done which will in law be regarded as carrying out this intention and as barring his right to recall the deed. *Prutsman v. Baker,* 30 Wis. 644, 646; *Cook v. Brown,* 34 N. H. 466; *Albright v. Albright,* 70 Wis. 528, 533; *Williams v. Daubner,* 103 Wis. 523; *Campbell v. Thomas,* 42 Wis. 437; *Schmidt v. Deegan,* 69 Wis. 300; *Lehigh C. & I. Co. v. West Superior I. & S. Co.* 91 Wis. 221; *Baker v. Haskell,* 47 N. H. 479.

For the respondents there was a brief by *Olin & Butler,* and oral argument by *J. M. Olin.* They argued, among other things, that whenever the estate is presently created, so that an interest vests with the execution of a paper, then, even though the enjoyment of the estate is postponed, the instrument creating it is a deed. *Spencer v. Robbins,* 106 Ind. 580, 5 N. E. 726; *Brown v. Atwater,* 25 Minn. 520; *Owen v. Williams,* 116 Ind. 70, 15 N. E. 678; *Diefendorf v. Diefendorf,* 132 N. Y. 100; *Rawlings v. McRoberts,* 95 Ky. 346, 25 S. W. 601; *Latimer v. Latimer,* 174 Ill. 418, 51 N. E. 548, 551. Unless an instrument which has been fully executed, from every point of view, seems to be a nullity, it will not be intended that the parties meant that it should be in-

valid, and some effect will, if possible, be given it. *Cates v. Cates,* 135 Ind. 272, 34 N. E. 957, 959; *Spencer v. Robbins,* 106 Ind. 580, 5 N. E. 727; *Gano v. Aldridge,* 27 Ind. 294; *Stout v. Dunning,* 72 Ind. 346. The following decisions illustrate how far the courts have gone in construing instruments so as to give them effect: *White v. Hopkins,* 80 Ga. 154, 4 S. E. 863; *Ball v. Foreman,* 37 Ohio St. 132, 141; *Johnson v. Hines,* 31 Ga. 720; *Graves v. Atwood,* 52 Conn. 512; *Webster v. Webster,* 33 N. H. 18; *Shackelton v. Sebree,* 86 Ill. 616; *Wyman v. Brown,* 50 Me. 139; *Bunch v. Nicks,* 50 Ark. 367, 7 S. W. 563; *Wall v. Wall,* 30 Miss. 93; *Owen v. Williams,* 116 Ind. 70, 15 N. E. 678. As to when a deed delivered to a third person will be deemed a present deed, they cited *Prutsman v. Baker,* 30 Wis. 644, 650; *Albright v. Albright,* 70 Wis. 528, 533; *Williams v. Daubner,* 103 Wis. 521, 523; 1 Devlin, Deeds, § 280; *Foster v. Mansfield,* 3 Met. 412; *Ball v. Foreman,* 37 Ohio St. 132, 139; *White v. Watts,* 118 Iowa, 549, 92 N. W. 660; *Albrecht v. Albrecht,* 121 Iowa, 521, 96 N. W. 1087; *Wheelwright v. Wheelwright,* 2 Mass. 447; *Hatch v. Hatch,* 9 Mass. 307; *Hathaway v. Payne,* 34 N. Y. 92, 106; 9 Am. & Eng. Ency. of Law (2d ed.) 157, 158; *Weuster v. Folin,* 60 Kan. 334, 56 Pac. 490; *Cook v. Brown,* 34 N. H. 460; *Bryan v. Wash,* 7 Ill. 557. The mere fact that the deed may be within the manual and physical power of the grantor to regain possession of it, or that it may be within his mental power to alter his intention, will not defeat the conveyance. *Sneathen v. Sneathen,* 104 Mo. 209, 16 S. W. 497, 499; *White v. Watts,* 118 Iowa, 549, 92 N. W. 660; *Albrecht v. Albrecht,* 121 Iowa, 521, 96 N. W. 1087, 1088; *Trask v. Trask,* 90 Iowa, 318, 57 N. W. 841, 843. Nor is it material that the grantee had no knowledge of the existence of the deed until after the grantor's death. The acceptance of a deed of valuable property will be presumed, although the grantee had no knowledge of the provision for his benefit; and this is especially

true when the conveyance imposes no condition or burden upon the grantee. In such a case, if the grantee accepts the benefit when the existence of the deed is brought to his knowledge, the acceptance relates back to the date of the conveyance. *Hatch v. Hatch,* 9 Mass. 307, 309; *Arrington v. Arrington,* 122 Ala. 510, 26 So. 152, 154; *White v. Watts,* 118 Iowa, 549, 92 N. W. 660, 662, and cases cited in opinion; *Jones v. Swayze,* 42 N. J. L. 279; *Bryan v. Wash,* 7 Ill. 557, 565; *Sneathen v. Sneathen,* 104 Mo. 209, 16 S. W. 497, 499; 9 Am. & Eng. Ency. of Law (2d ed.) 162, and cases cited; *Weuster v. Folin,* 60 Kan. 344, 56 Pac. 490.

DODGE, J. The finding of the court as to the words used by the deceased, John Willey, at the time the deed was placed in his wife's hands, must be sustained. It is supported by the testimony of the only living witness to the transaction, and is contradicted only by the fact that the same witness, on another occasion, in purporting to quote those words, omitted part of them. The only other question involved is whether from those words, in the light of the attending circumstances, we can say that the further finding that John Willey then intended to place the deed beyond his control, and therefore deliver it for the grantee, must be set aside as against the great preponderance of the evidence.

The rules of law generally governing the delivery of a deed to another than the grantee are quite well settled by our own decisions. *Prutsman v. Baker,* 30 Wis. 644; *Campbell v. Thomas,* 42 Wis. 437; *Albright v. Albright,* 70 Wis. 528, 36 N. W. 254; *Williams v. Daubner,* 103 Wis. 521, 79 N. W. 748; *Ward v. Russell, ante,* p. 77, 98 N. W. 939. These cases establish that the manual deposit of a deed with a third person, to receive and hold for the grantee, with intent thereby to give such paper effect as a deed and to place the same beyond the custody and control of the grantor, will give such deed validity and efficacy as against the grantor,

although some condition is imposed, precedent to final delivery to the grantee, which may serve to prevent vesting of actual title in him meanwhile, certainly if such precedent event is one sure to happen. There must be physical tradition of the deed out of the grantor's possession, and there must be the intent to place it out of his control for the benefit of the grantee. Obviously the latter element is the one over which difficulty most frequently arises, and not much can be said *a priori* to guide the judgment of trial courts thereon. Hardly more has been accomplished in that direction than to prescribe the rule that any express reservation of a right to withdraw the deed from the depositary refutes the intent essential to its efficacy. Obviously all the circumstances—closeness of relation to the depositary, naturalness of such selection as mere custodian for the grantor, ease of latter's physical access to papers as usually kept by the person selected as depositary, certainty or uncertainty of grantor's belief in his approaching death; all these, besides the spoken words—may vary the conclusion in different cases. Undoubtedly the wife of a bedridden man is so natural a person to receive into her hands a paper which he desires to retain in his legal custody that the intent to make an effective delivery is less readily to be inferred from the handing of a deed to her than if to a stranger. *Morris v. Caudle,* 178 Ill. 9, 52 N. E. 1036. Nevertheless, if the necessary intent exists, a deposit with her is as effective as with another. *Squires v. Summers,* 85 Ind. 252; *Stout v. Rayl,* 146 Ind. 379, 45 N. E. 515; *Sneathen v. Sneathen,* 104 Mo. 201, 209, 16 S. W. 497; *Miller v. Meers,* 155 Ill. 284, 40 N. E. 577. The question of that intent was, as we have said, one of fact, to be answered by inference from all the circumstances surrounding the transaction. While the inference might well be doubtful, we are convinced that the doubt is very evenly balanced between the conclusion reached by the trial court and a contrary one; nay, we are by no means certain that we should not reach the

same result. In such situation we cannot set aside the finding of fact as to John Willey's intent, which, standing, supports the judgment rendered.

By the Court.—Judgment affirmed.

CHAMPANE, Respondent, vs. LA CROSSE CITY RAILWAY COMPANY, Appellant.

March 25—April 19, 1904.

Street railways: Injury to passenger: Contributory negligence: Court and jury: Instructions.

1. In an action against a street railway company for injuries sustained by a passenger while alighting, though the testimony of plaintiff and her mother, to the effect that the car had stopped and that she was in the act of alighting when it started and caused her to fall, was contradicted by seven witnesses who testified that the car had started and was moving before she attempted to alight, it cannot be held that the trial court erred in refusing to set aside, as against the evidence, a verdict for the plaintiff.
2. The jury were charged, in positive and unqualified terms, that if plaintiff undertook to alight from the car while it was in motion she could not recover. Another instruction was to the effect that if they believed the car had stopped for a reasonable time and that plaintiff had given no notice or signal that she wished to get off at that place, and should further believe that after the car started it occurred to her that she ought to have gotten off, and should believe that she attempted to go out of the car while it was in motion, and should believe that its being in motion was the cause of her falling off, then she could not recover. *Held*, that, although this instruction included elements not necessary to be passed upon by the jury to acquit defendant of liability, yet, considering the charge as a whole, the jury could not have been misled as to the true rule.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action for personal injuries resulting from a fall from one of defendant's street cars in the city of La Crosse. *Sophia Champane,* accompanied by her mother, was a passenger on the car on the 3d day of April, 1901. She desired to get off the car at the intersection of George and Gillett streets, and would, according to custom, alight at the north line of the intersection of the streets. Plaintiff testified that she notified the conductor of her wish to get off, that the car stopped at the crossing, and that she was in the act of stepping off, when the car started with a sudden jerk, which caused her to be thrown to the ground. Her mother accompanied her on the trip, but did not attempt to get off the car at the crossing in question. She testifies that the car stopped; that two passengers arose and left the car at the crossing; that her daughter, the plaintiff, immediately arose and followed them, but that the car started while she was in the act of stepping from the car step to the street; that after the car had passed on for a considerable distance she observed plaintiff in the act of rising from her fallen position in the street and going to the sidewalk. The evidence of four other passengers is that the car was in motion when plaintiff arose to leave the car, and that she stepped off the car while it was in motion. There were two conductors on the car, who testify that she left the car while it was in motion. A witness upon the street stated that she observed plaintiff in the act of getting off the car, and that the car had been started from the crossing and had moved for some distance before she fell. There was evidence tending to show that plaintiff fell off the car at a distance of from forty to sixty feet beyond the crossing.

The jury returned a general verdict finding for the plaintiff, and assessing her damages at the sum of $1,225. Before verdict, defendant moved for a direction of a verdict in its favor. The motion was denied. After verdict, the defendant moved for a new trial upon the ground, among others, that

the verdict was contrary to the law and the evidence and that it was therefore perverse. This motion was denied. Judgment was awarded plaintiff for the amount of the damages found by the jury and for costs. This is an appeal from that judgment.

For the appellant there was a brief by *Woodward & Lees,* and oral argument by *G. M. Woodward.*

For the respondent there was a brief by *Morris & Hartwell,* and oral argument by *Thomas Morris.*

SIEBECKER, J. The first exception urged is that the court erred in submitting the case to the jury upon the evidence. It is contended that the plaintiff arose from her seat and got off the car while it was in motion, and that the evidence leaves no room for conflicting inferences upon this question. This claim is based upon the assumption that plaintiff's testimony and that of her mother, tending to show that she had nearly gotten off the car while it stopped, is against the reasonable probabilities and the overwhelming preponderance of the evidence.

From the testimony of plaintiff and her mother it appeared that plaintiff gave notice to the conductor that she wished to get off the car at the Partridge drug-store crossing, this being the north crossing of Gillett street; that the car stopped; that she arose from her seat, followed two passengers out of the door to the platform, and was in the act of alighting from the last step when the car started, and that this caused her to fall onto the street within a few feet of this crossing. This evidence is clearly contradicted by the testimony of the two conductors and five other witnesses who observed the accident. The finding of the jury was affirmed by the trial court in passing upon the motion for a new trial. The evidence in itself is not so inherently improbable, nor so completely overcome by the testimony of the other witnesses and the facts and circumstances of the case, as to jus-

tify this court in concluding that it furnishes no support for the verdict. The testimony of plaintiff and her mother, if credible, furnishes a sufficient and legal basis for the company's liability. It is not impeached except by the testimony of the other witnesses. The situation thus presented is one peculiarly depending upon the weight of the evidence and the credibility of the witnesses. We cannot say that the trial court erred in refusing to set aside this verdict as against the evidence in the case. The case bears a close analogy to and comes within the ruling of *Hardy v. Milwaukee St. R. Co.* 89 Wis. 183, 61 N. W. 771, and subsequent cases approving the ruling in the *Hardy Case.*

The court gave the jury the following instruction:

"But if you believe that a reasonable stop was made—that is, a stop for a reasonable length of time—at or near Gillett street, and that she had given no notice or signal that she desired to get off at this place, and shall further believe that afterwards, after it started, it occurred to her that she ought to have gotten off at this place at Gillett street or where it stopped, and shall believe that she attempted to go out of the car while it was in motion and after it had started again, and shall believe that by reason of its being in motion was the cause of her falling off, then she cannot recover in the action."

It is urged that this is misleading, in that the instruction includes elements wholly immaterial and not necessary to be passed upon by the jury to acquit defendant of liability. The court had given instructions upon this branch of the case in very positive and unqualified terms, stating that, if respondent undertook to leave the car after it had started and was in actual motion, she could not recover in the action. Different parts of the charge state the rule unqualifiedly that, if a passenger undertakes to alight from a car while in motion and is injured in getting off the car, he has no claim against the street car company for any damages so sustained. Taking these parts of the charge in connection with the part

excepted to, we do not think the jury could have been misled in applying the correct rule to the facts found by them.

By the Court.—The judgment of the circuit court is affirmed.

MILLER, Respondent, vs. HOESCHLER, Appellant.

March 25—April 19, 1904.

Action, at law or in equity: Injunction: Threat of repeated trespass: Fences.

A court of equity will not interfere to prevent a mere threatened trespass upon land; but where, by reason of the continuous or repeated character of the threatened invasion, many actions at law would be necessary, in no one of which could compensation for the whole wrong be obtained, an action for an injunction may be maintained. So *held*, on demurrer to a complaint alleging that defendant had built a fence on plaintiff's land, cutting him off from access to a street; that plaintiff had removed the fence; but that defendant threatens to re-enter and reconstruct the fence as often as plaintiff removes it.

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Doherty & Baldwin,* and for respondent on that of *John A. Daniels.*

WINSLOW, J. This is an action in equity to enjoin the commission of repeated and continuous threatened trespasses upon real estate. A general demurrer to the complaint having been overruled, the defendant appeals. The complaint alleges that the plaintiff owns, occupies, and has record title to, certain lots in the city of La Crosse, and has occupied the same for many years as a homestead; also that plaintiff occupies, and, by adverse possession for more than twenty years, has title to, a certain described strip of land between said lots and Ninth street in said city, which constitutes a

part of his said homestead and dooryard and constitutes his only means of access to said Ninth street; that defendant wrongfully entered on said strip in May, 1903, and constructed a wire fence on the side thereof nearest to plaintiff's house, thereby cutting off the plaintiff from the use of his dooryard and from all access to Ninth street from his said house; that plaintiff immediately removed said fence, but that defendant asserts and threatens that he will re-enter and reconstruct the fence as often as plaintiff removes same, and plaintiff fears that he will do so and thus cause plaintiff an irreparable injury and force the commencement of a multiplicity of trespass actions, unless the defendant be restrained from such acts.

The simple question presented is whether the complaint states a cause of action in equity, or, in other words, whether it appears therefrom that there is an adequate remedy at law. The principle that a court of equity will not interfere to prevent a mere threatened trespass upon real estate is very ancient and well understood. The idea is that such a wrong is merely temporary in its nature, and, under all ordinary circumstances, may be fully recompensed by an award of damages; hence that the legal action affords perfect and adequate relief. While this rule is still in force, the tendency of recent decisions is to enlarge, rather than to narrow, the class of cases in which a court of equity will interfere to prevent threatened trespass. Not only will it act where the threatened trespass will work irreparable injury to the property itself, amounting essentially to destruction thereof, but also where, by reason of the continuous or repeated character of the threatened invasion, many actions at law would be necessary to be brought, in no one of which could compensation for the whole wrong be obtained. In such cases the legal remedy is held to be inadequate. It is simply an application of the very old principle that equity will interfere to prevent a multiplicity of actions at law. 3 Pomeroy, Eq. Jur.

(2d ed.) § 1357. This principle has been frequently applied by this court in the case of the unlawful attempt by public officers to take private property for a highway or other public use. *Flanders v. Wood,* 24 Wis. 572; *Church v. Joint School Dist.* 55 Wis. 399, 13 N. W. 272; *Smart v. Hart,* 75 Wis. 471, 44 N. W. 514; *Ruhland v. Jones,* 55 Wis. 673, 13 N. W. 689. But it has not been confined to cases of threatened public use of lands. It has also been applied to actions between private parties—as, for instance, the threatened unlawful and continuous entry upon lands for the purpose of mining (*Tipping v. Robbins,* 71 Wis. 507, 37 N. W. 427); or the threatened drawing of water from a mill race (*Fox River F. & P. Co. v. Kelley,* 70 Wis. 287, 35 N. W. 744). In both of these cases the jurisdiction of equity was sustained upon the distinct ground of the prevention of the multiplicity of inadequate actions at law for trespass.

Had the defendant desired to try the question of the title to the land in question before a jury in an action at law, he could have commenced his action of ejectment and obtained his desire. He can hardly complain of the act of the plaintiff in bringing him into a court of equity, when he attempted to take the law into his own hands.

By the Court.—Order affirmed.

RADICHEL, Respondent, vs. VILLAGE OF KENDALL, Appellant.

March 25—April 19, 1904.

Municipal corporations: Obstruction of street: Storage of vehicles: Injury to pedestrian: Evidence: Instructions to jury: Appeal: Briefs.

1. Long-continued use of a street for such a purpose as the leaving of vehicles or other objects therein may render it unsafe for public use so as to charge the municipality with liability for resulting injuries.

2. It need not be shown in such case that any particular vehicle had been customarily left in the particular way and at the precise place where the one causing the accident in question was at that time; but it is sufficient if it be shown that the leaving of that vehicle was a continuance of a customary use, permitted by the municipality, of the street in that immediate vicinity as a storage place for vehicles temporarily out of use, to such an extent as to render the street unfit for public travel.
3. Nor is it material that such leaving of vehicles in the street was for the convenience of the owners thereof while their horses were being cared for temporarily in a nearby barn.
4. Error in admitting evidence in such a case, that the defendant had allowed other places in its streets to be obstructed by the leaving of vehicles therein, is *held* to have been so far cured as not to have prejudiced the defendant by a direction to the jury to disregard such evidence.
5. Evidence of statements of the president of a village, subsequent to the accident in question, showing knowledge prior to the accident that the street was used as alleged, was admissible upon the question of notice.
6. Permitting a party to make further proof on rebuttal after both sides had rested will not be held ground for reversal unless shown to have been a clear abuse of discretion and to have substantially prejudiced the adverse party.
7. In appellant's brief the particular parts of the trial judge's charge which are claimed to be prejudicially erroneous should be specifically pointed out, with the reasons for citing them to the attention of this court.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action for damages for personal injury. The complaint was to this effect: For a long time prior to September 3, 1901, defendant's officers, charged with the execution of its duty to keep its streets reasonably safe for public travel, had been accustomed to permit the owner of a buggy to leave the same, when not in use, in the traveled part of Ward street in the defendant village, in front of a building located on lot 8, block 12, thereof. Such buggy, so located, rendered the street dangerous for public travel in the nighttime. Such officers, during the period mentioned, knew that the street at

the place aforesaid, and in that vicinity, was so customarily obstructed by buggies and other vehicles left therein by the owners thereof as to render it dangerous for public travel. Plaintiff, while traveling on said street at such place, in the exercise of ordinary care, and in the pathway customarily used by the public, at about 8:30 p. m., collided with one of the thills of a buggy, which extended across such pathway, whereby she was caused to fall and strike her head and face on the opposite thill, severely injuring her, to her damage in the sum of $3,000.

There were sufficient other allegations to constitute a cause of action if those mentioned are sufficient to show actionable fault on defendant's part. It answered by general denial.

On the trial the court held the complaint good, and that the evidence produced was sufficient to require the issues to be submitted to the jury. The verdict was special and to the effect that the street was dangerous for public travel as alleged, that defendant had constructive notice thereof for a sufficient length of time before the accident to enable it to remove such danger, that such dangerous condition was the proximate cause of plaintiff's injury, that she was not guilty of any want of ordinary care contributing thereto, and that she suffered damages to the extent of $200. Judgment was rendered accordingly, sufficient exceptions being saved to preserve for review the questions discussed in the opinion.

For the appellant there was a brief by *Masters & Graves,* and oral argument by *C. M. Masters.*

For the respondent the cause was submitted on the brief of *J. T. Dithmar.*

MARSHALL, J. The *gravamen* of the complaint is that the defendant had, for a long time before respondent was injured, permitted the street where the injury occurred to be unsafe for public travel by reason of the customary leaving therein of vehicles when not in use, in such a way that people

traveling thereon in the nighttime in the exercise of ordinary care were liable to collide with some such vehicle and receive a personal injury. We need hardly stop to discuss the question of whether the customary use of a street for the purpose of storing vehicles when not in use, so that the draft poles thereof are liable to be located across the pathway customarily used by pedestrians, would or might, as regards such persons, when traveling in the nighttime, render such street unsafe. One might as well dig a pit across a pathway as to leave a wagon tongue or the thill of a buggy across the same in such manner as it is alleged the one was which caused the injury in question. Either would constitute a trap that would be very likely to operate disastrously to a person using such pathway in the ordinary way in the nighttime.

Whether appellant was responsible for the unsafe condition of the street because of the same having existed for such a length of time that its officers charged with the duty of attending to such matters should have known thereof and remedied the danger, was solved in favor of respondent by the jury. That a street may be rendered unsafe for public use so as to charge a municipality with the consequences by the long-continued use thereof for such a purpose as the leaving of vehicles or other objects therein, seems obvious. It is supported by many adjudications on the subject, and is sufficiently shown by citations in the brief of counsel for respondent. *Cairncross v. Pewaukee,* 78 Wis. 66, 47 N. W. 13; *Pittenger v. Hamilton,* 85 Wis. 356, 55 N. W. 423; *Slivitski v. Wien,* 93 Wis. 460, 67 N. W. 730; *Morrison v. Eau Claire,* 115 Wis. 538, 92 N. W. 280; *Davis v. Corry City,* 154 Pa. St. 598, 26 Atl. 621; *McLaughlin v. City of Corry,* 77 Pa. St. 109; *Born v. A. & P. P. R. Co.* 101 Pa. St. 334; *North Manheim v. Arnold,* 119 Pa. St. 380, 13 Atl. 444; *Farley v. New York,* 152 N. Y. 222, 46 N. E. 506. The following are to the same effect: *Cohen v. New York,* 113 N. Y. 532, 21 N. E. 700; *Callanan v. Gilman,* 107 N. Y. 360, 14 N. E.

264; *Champaign v. Jones,* 132 Ill. 304, 23 N. E. 1125; Jones, Negligence of Mun. Corp. § 80. A street may be rendered unsafe by the improper placing of vehicles therein as well as by being obstructed in any other way, as said in some of the cases cited. A municipality is liable for damages caused by allowing its streets to be unfit for public travel by persons in the exercise of ordinary care, by reason of obstacles being permitted by it to remain therein, regardless of the kind thereof.

The point is made that there was no proof that the particular buggy which obstructed the street on the occasion in question had been left there on other occasions or that the street, at that particular point, had been customarily so obstructed. We do not deem it necessary to discuss that complaint, demonstrating the reasons for our disapproval thereof by referring in detail to the evidence. It was not essential to show that any particular buggy had been customarily left in the particular way and at the particular place as at the time of the accident. It was sufficient to show that appellant had allowed the street to be customarily used as a storage place for vehicles when they were temporarily out of use, to such an extent as to render it unsafe for public use, and that the leaving of the buggy which caused the accident was a mere continuance of such custom.

It is further claimed that there was no evidence warranting a finding that the street had been customarily obstructed by vehicles at the precise place where the accident occurred prior thereto. If that were so, it would not be material. As before indicated, it is sufficient if the street in the immediate vicinity had been allowed by the appellant to be customarily dangerously obstructed by the leaving of vehicles therein, so that such custom was reasonably probable to create such a danger as caused the occurrence in question. On that there was ample evidence to carry the case to the jury. The fact, if it were a fact, that no vehicle, prior to the accident, had

been so left in the street as to obstruct the same at the precise place where the one in question was at the time in question, does not affect the case. Neither is it material if the customary leaving of vehicles in the street was for the convenience of the owners thereof while their horses were being cared for temporarily in a nearby barn, if the vehicles were so left to such an extent as to render the street unfit for public travel. *Sykes v. Manchester,* 59 Iowa, 65, 12 N. W. 755, relied on by appellant's counsel, is in harmony with this.

Error is further assigned because the court permitted evidence to be introduced showing that appellant allowed places in its streets other than the one where the accident occurred to be customarily obstructed by the leaving of vehicles therein. That was error. However, the court directed the jury to disregard the evidence, and upon the whole case it seems that such direction so far cured the error that appellant was not prejudiced thereby.

Further complaint is made because respondent was permitted, after both sides rested, to make further proof on rebuttal. In the absence of a clear abuse of judicial discretion in a matter of that kind, and clear indications that the adverse party was substantially prejudiced, no advantage can be taken thereof on appeal.

Further error is assigned because testimony was allowed regarding statements of the president of the appellant subsequent to the accident, showing knowledge prior to such accident that the street was in use as alleged. We perceive no error in that. It was proper on the question of notice.

We are invited to examine numerous exceptions to the charge without any of them being discussed by counsel. The brief leaves us to search the printed case and to determine from indications therein what parts of the charge were excepted to, and to test the same for error without the benefit of counsel's reasons for complaining, except in one instance. That is not the proper way to submit such a matter for our

consideration. The particular parts of the judge's charge claimed to be prejudicially erroneous should have been specifically referred to with the reasons for citing the same to our attention. However, we have carefully read the charge for error, and find that it is free from anything of a prejudicial nature.

Counsel suggests that the court should have limited the jury, in respect to whether the street was dangerous or not, to whether any buggy had been customarily left at the precise point where the accident occurred, prior thereto. That cannot be approved, as we have heretofore said, in effect. The jury were told, generally, that if vehicles, prior to the accident, had been customarily allowed to remain in that part of the street including the place in question, to such an extent as to obstruct the same and render it dangerous for public travel, and such custom had existed so long before the accident that appellant's officers, by exercising ordinary care, might have discovered the danger and remedied it, a finding in the affirmative on the interrogatories respecting those subjects should be made. We see no infirmity in such instruction. What has been said covers all the errors assigned, and leads to the conclusion that the judgment should be affirmed.

By the Court.—So ordered.

BUTT, Respondent, vs. SMITH, Appellant.

March 25—April 19, 1904.

Contracts: Sale of land: Consideration: Mistake: Parol evidence: Recovery of overpayment.

Where, pursuant to an oral agreement for the sale of a tract of land at a certain price per acre, the land was conveyed, but, by a mutual mistake of the parties as to the real number of acres, the consideration recited in the deed and actually paid

was excessive, the agreement was not merged in the deed, but may be shown by parol evidence, and the overpayment may be recovered. *Ohlert v. Alderson*, 86 Wis. 433, distinguished.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action to recover $105.80 as an overpayment on a conveyance of land. Respondent alleges that he and appellant entered into an oral agreement whereby appellant agreed to sell and convey to him the east half of the northeast quarter of section 36, township 13, range 5, at an agreed price of $50 an acre, and that it was mutually agreed and understood that the tract conveyed contained eighty acres, and that the amount paid was computed upon such belief and understanding. Pursuant to the agreement, appellant conveyed the tract of land by deed reciting that it was "for and in consideration of the sum of four thousand dollars," paid him by respondent, the receipt whereof was acknowledged in the deed, and the land so conveyed to respondent was therein described as follows: "The east half of the northeast quarter of section 36, township 13, range 5." The deed was delivered to respondent, who paid the appellant the $4,000 as the consideration, took possession of the premises, and is still in possession of them. Shortly after the conveyance, respondent caused the tract to be surveyed, and found that it contained only 77.88 acres. He demanded repayment of the *pro rata* part of the consideration for such shortage, which was refused by appellant. He then brought this action to recover the overpayment upon the ground that he and appellant made a mistake in computing the amount of the consideration to be paid under the agreement for the land actually conveyed by the deed. There is no claim of fraud in the case. Respondent admits that he has received the full tract purchased by him, but asserts that through this mistake in computing the consideration to be paid for the number of acres conveyed he overpaid respondent the sum of $105.80.

Appellant objected to the reception of any evidence under the complaint upon the ground that respondent had accepted the deed describing the land as an entire tract at the agreed gross sum of $4,000, and that he could not show any prior oral agreement of sale at a stipulated price per acre for the actual number of acres conveyed after having accepted the deed and paid the consideration. The case was submitted to the jury, who under proper instructions found that the parties made a mistake as to the number of acres in the tract, and that this resulted in an overpayment of the sum claimed, and that respondent was entitled to recover the same. The court awarded judgment for the amount of damages and for costs. This is an appeal from the judgment.

H. P. Proctor, for the appellant, cited *Marvin v. Bennett,* 26 Wend. 169; *Wood v. Murphy,* 47 Mo. App. 539; *Frenche v. Chancellor,* 51 N. J. Eq. 624, 27 Atl. 140; *Pringle v. Rogers,* 193 Pa. St. 94; *Williams v. Hathaway,* 19 Pick. 387; *Ohlert v. Alderson,* 86 Wis. 433; *Howes v. Barker,* 3 Johns. 506; *Lane v. Parsons,* 108 Iowa, 241, 79 N. W. 1039; *Wilson v. Riddick,* 100 Iowa, 697, 69 N. W. 1039.

For the respondent there was a brief by *C. W. Graves* and *C. M. Butt, Jr.,* and oral argument by *Mr. Graves.*

SIEBECKER, J. Respondent's right to recover in this action is predicated upon the claim that he overpaid appellant for the land conveyed to him by the deed through the mutual mistake of himself and appellant as to the number of acres included in the tract of land. He asserts that before the deed was executed and delivered it was agreed between himself and appellant, as owner of the farm, that he would buy it and pay therefor at the rate of $50 per acre; that he and appellant mistakenly believed that it contained eighty acres, and that they computed the amount of the consideration as expressed in the deed upon that basis. The jury, under full and proper instructions upon the issues, found that respond-

ent was to pay for the farm at the rate of $50 per acre for the number of acres actually conveyed, and that there was an overpayment to the amount claimed by respondent, due to the fact that both parties labored under the mistake as to the number of acres in the tract at the time of the negotiations and when the consideration was paid.

Appellant contends that parol evidence of the preliminary agreement cannot be received, upon the ground that this preliminary agreement for the sale and purchase of the farm merged in the deed, and such parol evidence would alter, vary, or contradict it. That this rule does not apply to the consideration expressed in the deed is confirmed by many decisions. Parol evidence is admissible to show the real consideration of the conveyance, though it be different from that expressed in the deed, if it be consistent therewith. *Powers v. Spaulding,* 96 Wis. 487, 71 N. W. 891; *Cuddy v. Foreman,* 107 Wis. 519, 83 N. W. 1103; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681. Nor is the deed conclusive upon the parties when it appears that the amount of the consideration was computed upon a mutual mistake of the parties as to the quantity of land actually conveyed. Whenever the fact appears that the deed does not express the previous agreement of the parties by reason of mutual mistakes, courts of equity have not hesitated to grant relief to meet the exigencies of the situation in conforming the nominal agreement to the real one, or by an abatement from the purchase money when the mistake was susceptible of correction in this way. *Darling v. Osborne,* 51 Vt. 148; *Hill v. Buckley,* 17 Ves. Jr. 394; *Paine v. Upton,* 87 N. Y. 327; *Hubbard v. Marshall,* 50 Wis. 322, 6 N. W. 497. Recovery has been awarded in cases wherein it appeared that land was purchased under a preliminary agreement, which was not intended to be fully embodied in the deed, but which fixed the terms of the sale by the acre, and wherein it appeared that there was an overpayment of the purchase price through the

mutual mistake of the parties as to the actual number of acres included in the tract conveyed. The ground of recovery in such cases is based upon the preliminary contract, which has been in part performed by the conveyance and payment of the consideration, but which has not been wholly merged in the deed. The additional elements of such contracts, relied on for a recovery, must be such as are not embodied in and in no way contradict, vary, or modify the effective part of the conveyance as agreed to and accepted by the parties. This relief is given upon the equitable consideration that the overpayment resulted from a mutual mistake of the parties, which should preclude either from reaping an advantage to the injury of the other on account of such error. Since such circumstances do not require a reformation of the deed, there is nothing which calls for the extraordinary powers of the court of equity. The controlling question is, Was there an overpayment under terms of the contract of sale, which terms have not been merged in the deed? If so, the vendor ought to be held liable therefor to the vendee in an action for money had and received. The cases upon this subject, though seemingly somewhat in conflict, can be harmonized by distinguishing those which pertain to transactions which are merged and embodied in the deed and those wherein recovery is sought to be enforced upon the terms of the preliminary contract not embodied in and merged in the conveyance. *Witbeck v. Waine,* 16 N. Y. 532; *Cardinal v. Hadley,* 158 Mass. 352, 33 N. E. 575; *Ludeke v. Sutherland,* 87 Ill. 481; *Green v. Batson,* 71 Wis. 54, 36 N. W. 849; *Ohlert v. Alderson,* 86 Wis. 433, 57 N. W. 88; *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800; *Cuddy v. Foreman,* 107 Wis. 519, 83 N. W. 1103; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681. The language in the opinion of *Ohlert v. Alderson, supra,* when disassociated from the facts in the case, may be interpreted to include the instant case; but when applied to the facts then before the court it will be observed that the

case is clearly distinguishable from the case now before us. In the *Ohlert Case* the preliminary contract of sale was in writing, embodying agreements of the parties which were merged in the deed. The court stated the grounds of the decision thus:

"The contract and deed clearly stated a sale and conveyance of what may be aptly termed as a 'lump quantity' for a definite gross sum, and as there was no allegation of fraud or mistake, parol evidence to the contrary was certainly inadmissible; and it was wholly immaterial how the parties arrived at the sum to be paid, or whether there was any discussion or understanding as to the quantity of the land. All these matters are merged in the written *instruments,* and their language is decisive and final."

We must hold that the terms of the agreement, fixing the price of the land at $50 per acre, were not incorporated and merged in the deed, and that the objection to the reception of any evidence under the complaint was properly overruled.

The errors assigned upon the instructions given bear upon the same question, and therefore require no further consideration.

By the Court.—Judgment affirmed.

OLSON, Appellant, vs. CITY OF VIROQUA, Respondent.

March 26—April 19, 1904.

Contracts: Breach: Delaying performance: Recovery.

A contract for the drilling of a well by plaintiff for defendant provided that defendant should furnish the casing pipe and material for the pump; that plaintiff should put everything in place ready for pumping and assist in connecting the pump; and that the work should be pushed to completion with all possible dispatch and without unnecessary delay. Defendant failed to furnish the pipe and material for the pump for sev-

eral weeks after plaintiff was ready to put them in the well, thereby delaying plaintiff in the performance of his contract. *Held*, that for such delay plaintiff might recover substantial damages.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Reversed.*

It appears from the record that April 13, 1900, the plaintiff and defendant entered into a written contract wherein and whereby the plaintiff, at his own expense, agreed to "drill and sink a new well" at a point to be designated by the defendant according to specifications therein set forth, and for which the defendant therein agreed to pay to the plaintiff $2.50 per foot, not to exceed 500 feet, and the defendant therein further agreed "to furnish the casing pipe and material for the pump," and the plaintiff was "to put everything in place ready for pumping and assist in connecting the pump," and the defendant was "to render what assistance is [was] necessary to put in the pipe;" and the plaintiff therein agreed that all work should be done in a workmanlike manner, and the hole to be perpendicular, and to dig the well to such a depth as the defendant might direct, not exceeding 500 feet, the work to begin May 15, 1900, "and be pushed to completion with all possible dispatch and without any unnecessary delay;" that when such work should be completed and accepted the plaintiff was to receive $2.50 per foot, as so provided, and the plaintiff therein agreed "to place case and piping and make all connections below the surface," and for that work he was to receive from the defendant $40 extra. It also appears from the record that the plaintiff began the work of drilling the well May 15, 1900; that he continued such work, as agreed in the contract, until November 1, 1900, when the hole had reached the depth of 316 feet; that he was then informed by the defendant that he need not drill any deeper; that at that time the defendant had failed "to furnish the casing pipe and material for the pump," as so agreed; that

the same were not ordered by the defendant until November 6, 1900, and that they did not arrive until several weeks afterwards. On May 8, 1901, the plaintiff presented to the common council and filed with the city clerk his verified claim for damages occasioned by and growing out of the loss of time of himself, team, and machinery, and for certain disbursements for expenses incurred in behalf of the defendant, occasioned by the failure of the defendant to comply with the contract to provide and furnish the pump therein mentioned, and by unnecessarily delaying the plaintiff in completing his contract, to his great damage; and also in ordering and requesting the plaintiff to leave his well-drilling machinery upon the ground where the well was drilled, and for bidding the plaintiff from removing the same, whereby he lost the use of such machinery, to his great damage—all of which was stated to the common council in an itemized bill duly verified. The claim was not acted upon by the common council for sixty days, and december 2, 1901, the city clerk notified the plaintiff of the fact, and that the claim had been fully disallowed, and thereupon the plaintiff appealed therefrom to the circuit court.

A trial being had, and after the close of the testimony and during the closing argument of the plaintiff's counsel, the court interrupted counsel, and held that there was no evidence which would warrant the jury in finding anything against the defendant, and thereupon directed a verdict in favor of the defendant, which was returned accordingly. From the judgment entered thereon, with costs, the plaintiff brings this appeal.

For the appellant there was a brief by *C. W. Graves* and *W. S. Burroughs,* and oral argument by *Mr. Graves.*

H. P. Proctor, for the respondent.

CASSODAY, C. J. The substance of the contract is set forth in the foregoing statement. By that agreement the city was

"to furnish the casing pipe and material for the pump," and to render what assistance was necessary to put in the pipe. The plaintiff was to put everything in place ready for pumping and assist in connecting the pump. The work was to be commenced as agreed, "and be pushed to completion with all possible dispatch and without any unnecessary delay." To complete the work as agreed, it was absolutely essential that the two parties should co-operate. It was impossible for the plaintiff to put everything in place ready for pumping and assist in connecting the pump so long as the defendant failed to furnish the casing pipe and material for the pump. The evidence certainly tends to prove that the defendant failed to so furnish such casing pipe and material for the pump for several weeks, if not months, after the plaintiff was ready to put the same in the well. If such evidence is true—and it seems to be undisputed—then there was certainly a breach of the contract on the part of the defendant, which greatly delayed performance of the contract on the part of the plaintiff. *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, 471, 94 N. W. 337, and cases there cited. That such breach of the contract entitled the plaintiff to substantial damages there can be no doubt. *Wood v. Schettler,* 23 Wis. 501; *Salvo v. Duncan,* 49 Wis. 151, 4 N. W. 1074; *Allen v. Murray,* 87 Wis. 41, 57 N. W. 979; 3 Suth. Dam. (3d ed.) § 713; *Wells v. Nat. L. Asso.* 53 L. R. A. 48, note. The measure of such damages must necessarily depend very much upon the evidence. As there must be a new trial and the evidence may be different, we have purposely refrained from considering such measure of damages.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GERMAN AMERICAN BANK, Respondent, vs. POWELL, Appellant.

March 26—April 19, 1904.

Insolvency: Jurisdiction: Collateral attack: Fixing day for hearing: Order: Evidence: Proof of notice: Mandatory statute.

1. If lack of jurisdiction appears on the face of the record in insolvency proceedings, the discharge therein may be attacked collaterally.
2. Proceedings by an insolvent debtor under ch. 179, Stats. 1898, to obtain a discharge from his debts are strictly adversary, and creditors whose claims are to be barred thereby must be made parties and jurisdiction of them obtained in the manner provided by the statute.
3. Under sec. 4285, Stats. 1898, the fixing of a day for the hearing, in the order to show cause why a discharge in insolvency should not be granted, is jurisdictional.
4. Where, in the written order on file, the date fixed for the hearing is left blank, a recital in a subsequent order that the court did in fact fix a certain day as the time for the hearing sufficiently shows that the day was properly fixed.
5. The written order on file is not necessarily the decision of the court, but generally is merely evidence thereof, the announcement from the bench being the order in fact.
6. The provision of sec. 4288, Stats. 1898, that on the day fixed in the order to show cause proof shall be made of the service and publication of the required notices "before any other proceeding shall be had," is mandatory and exclusive, and a discharge granted before the filing of such proof is without jurisdiction and void.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action upon a promissory note executed by the defendant January 2, 1895, the action having been commenced July 15, 1897, but not tried until May, 1903. The defense pleaded was a discharge of the defendant under the state insolvency law, viz., ch. 179, Stats. 1898, which discharge was alleged to have been granted September 30, 1897. Upon the trial before the court the record of the insolvency

proceedings was introduced in evidence, and it appeared from the record that the defendant made due petition for a discharge under said chapter 179, which petition was filed June 29, 1897; that the circuit court upon the same day signed a written order reciting the filing of the petition and ordering all creditors to show cause "on the —— day of September, 1897," why an assignment of the property of the insolvent should not be made and a discharge granted to him; that on the 30th day of September, 1897, the court made another written order, in which it was recited that, "the above-entitled matter having been heard by the circuit court of La Crosse county on the 14th day of September, 1897, the day fixed in said order to show cause," it was ordered that said *Powell* be adjudged an insolvent, and that one James R. Hill be appointed assignee of his estate, and that an assignment of all the property of said *Powell* be made by him to said Hill; that in pursuance of said order and upon the same day an assignment was made by *Powell* of all his property to said Hill, and a proper certificate was also made by the assignee, and that a discharge of all his debts was granted by the court to said *Powell* on said 30th day of September, 1897, under the provisions of sec. 4299, Stats. 1898; that no affidavits showing the publication of notice to creditors were on file on September 14th or on September 30th, nor any affidavits showing the mailing of notice to creditors; that the affidavit of publication in the West Salem Journal of said notice was not in fact made until October 6, 1897; that the affidavit of publication in the Wisconsin State Journal was never signed by any person, and not filed until October 6, 1897; that the affidavit of mailing was not made or filed until October 6, 1897. An affidavit showing proper publication in the Wisconsin State Journal was filed June 29, 1903.

The court held upon this record that no valid discharge was shown, and judgment was entered for the plaintiff for the amount due upon the note, and the defendant appeals.

C. L. Hood, for the appellant.

For the respondent there was a brief by *McConnell & Schweizer,* and oral argument by *C. H. Schweizer.*

WINSLOW, J. The plaintiff attacks the discharge in insolvency collaterally, and this it may unquestionably do if the lack of jurisdiction appears upon the face of the record. *O'Malley v. Fricke,* 104 Wis. 280, 80 N. W. 436. The question is, Does it so appear? The plaintiff claims that lack of jurisdiction appears in two ways: first, because the written order fixing the date for the hearing of the petition and for creditors to show cause contained no date in fact, but directed that cause be shown "on the —— day of September, 1897;" and, second, because the record shows that proof of the publication and mailing of the required notices to creditors was not filed until October 6, 1897, being six days after the discharge itself was granted.

The proceedings by an insolvent debtor to obtain a discharge under ch. 179, Stats. 1898, are strictly adversary proceedings, as much so in fact as are actions at law. The creditors whose claims are to be barred must be made parties to the proceedings and jurisdiction of them obtained in the way laid down by the statute or their rights will not be affected. This is self-evident. The statute (sec. 4285, Stats. 1898) provides that upon the filing of the insolvent's petition and schedules the court shall make an order requiring the creditors to show cause why a discharge should not be granted, which order "shall also fix a day in the same or next ensuing term for the hearing thereof." There can be no question but that the fixing of the day is jurisdictional. As the written order on file contains a blank at this point, the contention is that it is conclusively shown that no day was fixed. But the written order is not necessarily the decision of the court, but generally is merely evidence thereof. The announcement from the bench is the order or judgment in

fact. *Baker v. Baker,* 51 Wis. 538, 8 N. W. 289; *Allen v. Voje,* 114 Wis. 1, 89 N. W. 924. Had the clerk's minutes been introduced, and had it appeared therefrom that the court announced from the bench that the matter would be heard on the 14th of September, the statute would unquestionably have been satisfied, notwithstanding the *hiatus* in the written order. The minutes were not introduced, but the order of September 30th following was introduced, in which is a definite recital over the signature of the court that the 14th day of September was the day fixed for the hearing of the order to show cause. This is certainly some evidence that the day was properly fixed. It does not conflict with the written order, but simply supplies a blank which was evidently left in the written order by obvious mistake. It is absurd to suppose that the court made an order for hearing and deliberately fixed no date for that hearing. We think, therefore, that it sufficiently appears from the recital in the order of September 30th that the court did in fact fix the 14th of September as the time of hearing of the petition, notwithstanding that the date was not inserted in the written order.

Proceeding to the next question, we find it more serious. Sec. 4288, Stats. 1898, provides that on the day fixed in the order to show cause or any subsequent day that the court may appoint, the proofs or allegations of the parties shall be heard by the court, "but before any other *proceeding shall be had* proof shall be made of the service and publication of the notices provided for in the preceding sections." The preceding sections require that notice of the order to show cause aforesaid shall be published in a newspaper at the seat of government and in a newspaper published in the county where the application was made, and that a copy shall be served personally or by mail on each creditor. The record shows that none of the proofs of publication or mailing were filed until October 6, 1897, and that the order of discharge was granted September 30, 1897. We regard this as fatal to

the jurisdiction of the court. It cannot be treated as a mere irregularity. "Before any other proceeding shall be had" are the words of the statute. They are mandatory and exclusive, if words ever were mandatory or exclusive. Until the proofs are filed there is no power given to the court to take a step. It is futile to question the wisdom or reasonableness of the legislative will. It was within the power of the legislature to make such a provision, and the courts must respect it. It necessarily follows that the defect could not be cured by filing proofs at a later day.

By the Court.—Judgment affirmed.

DAVIS and another, Respondents, vs. LA CROSSE HOSPITAL ASSOCIATION, Appellant.

March 26—April 19, 1904.

Building contract: Waiver of lien: Payment for "extras:" Condition precedent: Waiver of prior valuation: Allowance of additional time: Architect's certificate: Liquidated damages.

1. The right to a mechanic's lien may be waived by an agreement not to exercise it; but if the contract is ambiguous on the question the doubt will be resolved against the waiver.
2. A contract providing for delivery of the completed building to the owner "free from all claims, liens, and charges," and for final payment when the architect should be satisfied that the building was in fact free from liens, is *held* to refer only to liens of those claiming through or under the contractor, and not to be a waiver of his own right to a lien.
3. A stipulation in a building contract to the effect that, unless the value of additions to or deductions from the contract work shall first have been agreed upon and indorsed upon the contract, the difference in value, whether in favor of the contractor or of the owner, shall be deemed forfeited, should not be held to have been waived—at least in respect to trifling changes—by the mere failure to agree upon and indorse their value. It should be held waived in such case only upon clear and satisfactory evidence showing that to have been the intention of the parties or showing an estoppel *in pais.*

4. A contract provided in effect that no additional time should be allowed for the completion of the building on account of delays arising from certain specified causes unless at the time of such delay written notice should be given to the architect and he should then make the allowance. *Held*, that where no notice of claim for additional time was made under that provision, the architect had no right to consider such delays in determining whether or not the work could reasonably have been completed at the stipulated time.
5. A contract for the building of a hospital for $24,660 provided that the contractor should pay $20 for each day the work remained uncompleted after a time fixed. The character of the building being such that the actual damages resulting from such a delay, or the rental value of the building, would be very difficult of ascertainment, and the amount stipulated not being largely, if at all, in excess of a fair interest on the investment, it is *held* that the provision was one for liquidated damages and not for a penalty.
6. The delay for which, in such a case, the stipulated sum per day is payable refers to working days only.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Action to enforce a mechanic's and materialman's lien for a balance of $660 alleged to be due on contract, and for the value of some extra work done and material furnished. Facts were alleged entitling plaintiffs to the relief prayed for. The answer admitted that there was an unpaid balance of $660, but denied all the allegations upon which the liability for extra work was predicated, and alleged that the contract expressly provided that no addition to the work therein specified should be made a liability against the proprietor without the additional amount to be paid therefor being first determined in a particular manner described and indorsed in writing by both parties upon the contract; that without such determination and indorsement the difference in the expense, whether in favor of the proprietor or the builder, should be forfeited. It was further alleged that there was no such determination and indorsement as to any of the alleged extra

work. Defendant further counterclaimed for damages at a stipulated rate, making $2,640. The contract provided for the completion and delivery of the building to the proprietor, free of all liens, claims, and charges, by November 1, 1900, or the payment as liquidated damages of $20 per day for each day such completion and delivery should be delayed, upon condition, however, of the architect, G. L. Harvey, certifying that such completion could have been reasonably accomplished by the time named. It was agreed time should be deemed the essence of the contract. The architect certified in writing that the building could reasonably have been completed within the time stipulated in the contract, whereas it was not completed and delivered to defendant until April 25, 1901.

To that, reply was made denying the material allegations and alleging that if the architect made any certificate under the provisions of the contract referred to, to the effect alleged, it was made dishonestly through collusion with defendant. Reply was further made that the provisions of the contract relied on by the defendant were waived by the parties.

The contract price for the building was $24,660. The contract contained the provisions set forth in the defendant's answer, and the architect made the certificate therein alleged. The evidence was to the effect that the building was not completed till long after the stipulated time, and not earlier than April 1, 1901; that some work was done and material furnished not strictly required by the contract, and that no attention was paid to the provision of the contract in that regard. There was conflicting evidence in respect to the question of whether the plaintiffs were delayed in the performance of their work by conditions for which defendant was responsible; and that the architect, in making his certificate, did not take into consideration such delays. The contract contained this provision on that subject, in close connection

with one in regard to the liability of the builder to pay $20 per day as liquidated damages upon the contingencies before mentioned:

"If said work shall be delayed by frost or inclement weather or by general strikes of workmen causing delay to said party of the second part, or in case alterations or additions requiring additional time shall have been executed as aforesaid, or in case delay be caused to said party of the second part by other contractors upon said building, provided written notice is given to such architect at the time of such delay, an allowance for the same as determined by said architect shall be added to the time stipulated for the completion of said work."

No claim for additional time to complete the building was made under that provision. The court found for the plaintiffs upon all the issues except as to the claim for extra work in excess of $38.30. It was held that the architect, in making the certificate, by reason of his failure to consider the causes which delayed plaintiffs and interfered with their completion of the building by the time stipulated in the contract, acted arbitrarily and fraudulently, and that therefore such certificate was not binding upon the plaintiffs. Judgment was ordered in their favor according to the prayer of the complaint, except that the amount allowed for extras was limited to $38.30. Judgment was so rendered.

For the appellant there was a brief by *McConnell & Schweizer,* and oral argument by *C. H. Schweizer.*

For the respondents there was a brief by *Miller & Wolfe,* and oral argument by *W. F. Wolfe.*

MARSHALL, J. Whether the judgment should be affirmed or not depends upon the solution of three plain propositions: First, did the stipulation in the contract, to deliver the building free of all claims, liens, and charges, preclude respondents from filing a lien to enforce payment of any sum they might be compelled to recover of appellant by action? Sec-

ond, was the court warranted in holding that the provision of the contract as to forfeiture of claims for extra work was waived? Third, was the court warranted in ignoring the architect's certificate as regards whether the building could reasonably have been completed by the time stipulated in the contract? We will consider each of such propositions.

1. A builder may waive his right to the lien remedy given by statute, and does so by agreeing not to exercise such right. *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490. Such an agreement may be made by an express stipulation not to file a lien (*Fidelity Mut. L. Asso. v. Jackson,* 163 Pa. St. 208, 29 Atl. 883; *Schroeder v. Galland,* 134 Pa. St. 277, 19 Atl. 632; *Benedict v. Hood,* 134 Pa. St. 289, 19 Atl. 635; *Ballman v. Heron,* 160 Pa. St. 377, 28 Atl. 914); or by agreement in form that no lien shall be filed on the building under the lien laws of the state (*Seeman v. Biemann, supra*); or by an agreement that the builder "will not suffer or permit a lien to be filed" (*Scheid v. Rapp,* 121 Pa. St. 593, 15 Atl. 652); or by the giving of a bond by the builder that no lien shall be filed on the building (*Pinning v. Skipper,* 71 Md. 347, 18 Atl. 659); or in any other way clearly showing such to be the intention of the parties. But where the terms of a contract are ambiguous on the question, the doubt should be resolved against the waiver, since it should be presumed, in the absence of clear evidence to the contrary, that one has not disabled himself from the use of so valuable a privilege as that given by statute for the enforcement of a builder's rights in the circumstances involved in such a case as this. The stipulation here was for the delivery of the building, "free from all claims, liens, and charges" on or before November 1, 1900, etc. Payment of the contract price was agreed to be on monthly estimates made by the architect, less fifteen per cent., which reserved amount it was stipulated should be paid when the contract was completed and the architect satisfied that the building was in fact free from all

liens. Now it seems quite plain that the liens referred to in the last clause mentioned are the same as those referred to in the other clause. If so, it is obvious that the claims and liens in question are of a special class. It would be absurd to provide that a contractor shall be paid the amount due him for constructing a building upon satisfactory proof being made that he has no lien; while a provision that payment will be made upon such proof being made as regards those claiming under him would be reasonable, and is the common form of agreement. Our construction of the language of the contract is that it called for a delivery of the building free from any lien or claim for a lien through or under the builder. It could not reasonably have had reference to any lien filed by the builder, because the contract contemplated the probable lapse of time for making the last payment, after the completion of the building,—time sufficient to enable the architect to determine whether there were any liens, claims, or charges thereon. It was contemplated that there would be nothing due him till the happening of conditions precedent, which might not occur till after the day of delivery. Such was the case. The building was delivered before respondents had any cause of action against appellant. There was no lien on file at the time of the delivery, nor for some time thereafter, nor was there, so far as appears, any claim that might ripen into a lien, except that of respondents. It is considered that it was not intended by the parties to the contract that respondents should not have the statutory lien remedy to enable them to collect any sum that might be in the end due them, and payment of which they might be compelled to enforce by action.

2. In support of the court's ruling that the provision of the contract in regard to forfeiting claims for additions to the contract work and material, was waived, counsel for respondents suggest that such a provision can be waived, and cite *Bannister v. Patty's Ex'rs,* 35 Wis. 215. True, such a

provision can be waived; but that does not warrant holding, whenever a thing is done under a contract for which, by the terms thereof, additional compensation is dependent upon a certain specified condition being complied with, that such condition was waived as a matter of course because no notice was taken thereof. Such a method of dealing with a contract would result in sanctioning the very looseness, and suggest and give countenance to the very class of controversies, such provisions are designed to prevent. There would be, then, little or no use of making a written contract at all, containing such guards, because if one were made the court, upon a controversy thereunder occurring, would look to what was in fact done and test the contract by that instead of testing what was done by the contract in determining the legal rights of the parties. There is, at times, rather too much of a tendency to do that, the court acting as a mere arbitrator instead of judicially giving to each party his legal rights. Parties must be left to make their own contracts, and without any protection from improvident provisions embodied therein, in the absence of clear evidence of a modification or some relievable fraud or mistake. A contract once made can be subsequently varied by the parties thereto, and by parol, but a mere breach of contract, or failure to comply with the provisions therein upon which certain advantages are made to depend, should not be deemed a waiver of those parts of the agreement which would otherwise condemn the party guilty of the breach to damages, or condemn the party failing to perform such agreement to lose the advantages just as the contract provides. In the circumstances before us, a provision should not be deemed waived in the absence of clear and satisfactory evidence showing such to have been the intention of the parties, or showing an estoppel *in pais*. Certainly, the mere failure to do the very thing which the parties stipulated should work a forfeiture, is not sufficient. Otherwise the rule would be that, instead of a provision in a contract work-

ing a forfeiture under the circumstances therein prescribed, the doing of the thing which was stipulated should work a forfeiture would always be held not to do so, but to waive the conditions of the contract in that regard. If, under a contract containing such a provision, a builder were requested to and did perform extra work of such magnitude that the idea that it was intended he should have no additional pay therefor would appear highly unreasonable or absurd, a court might, nothing appearing to the contrary, conclude that there was a mutual intention to waive such provision. But such is not the case here. The written contract on its face contemplated that additions and deductions from the contract work might occur from time to time during the progress of the building. An express stipulation on the subject was inserted therein, with the one to the effect that, unless the value of additions or deductions should be determined and the advantage as to cost of the building for the one side or the other be noted on the contract, the same should be deemed forfeited. The agreement was eminently fair. If the price of the building was lessened by the change, the understanding was just as express that no advantage to the proprietor should accrue thereby in the absence of the agreed evidence indorsed upon the contract, as was the understanding with reference to loss of advantages by the builder. The provision in that regard was a very wise one, and should be viewed favorably by the court rather than set aside upon a trifling pretext. *Abbott v. Gatch,* 13 Md. 314. The idea of the parties was, plainly, that trifling changes might occur in the design of the building during the progress of its erection, and that the proprietor should be free to order them made without thought of how the same would affect the cost of the structure, unless a claim should be made therefor seasonably, the effect upon the contract price of the building be determined in the manner agreed upon, and the fact in that regard be indorsed thereon. The changes for which the $38.30 were allowed by the court were clearly within that provision.

Our conclusion is that the evidence comes far short of showing any intention to waive the provision that additional compensation for additional expense in constructing the building, caused by variances in the character of the structure from the specifications of the contract, should depend upon the matter being treated as therein indicated. Such treatment was made a condition precedent to the recovery for extras, and should be enforced the same as any such condition. *O'Keefe v. St. Francis's Church,* 59 Conn. 551, 22 Atl. 325; *Bartlett v. Stanchfield,* 148 Mass. 394, 19 N. E. 549.

3. Much of what has been said on the second proposition applies to the third. The court found that the architect acted arbitrarily to the extent of perpetrating a fraud on respondents, because he did not consider the conditions which caused the delay in the completion of the building, in making the certificate. He followed, however, the terms of the contract. That in effect expressly provided that no claims for extra time to complete the structure should be allowed on account of any of the hindrances which respondents insisted in fact delayed them, unless at the time of such hindrances written notice should be given to the architect and he should then pass upon the same, making an allowance for additional time on account thereof. No such notice was given or allowance made. Hence the architect, when he came to make the certificate, had no right to consider any such interference. The learned court disregarded the certificate because he complied with the contract in making it. If he had not done so, it would have been the duty of the court to disregard the certificate in favor of the appellant. We are unable to see in the evidence or in the reasons assigned by counsel for respondents, any justification for holding that the certificate was other than just what the contract contemplated should be made under the circumstances.

A provision of the kind under consideration must not be set aside because it seems harsh. Parties have a perfect right to make harsh provisions in their contracts if they see fit.

If they do, courts should not sit to revise them. Their duty is to enforce contracts as they find them, regardless of consequences, when no invalidity is involved nor public policy violated, and no mutual mistake or fraud, nor clear evidence of modification.

Stipulations of the kind under consideration are uniformly enforced, there being no clear evidence of fraud or wrong equivalent thereto, or mutual mistake in the execution, or clear case of waiver. *Baasen v. Baehr,* 7 Wis. 516; *Hudson v. McCartney,* 33 Wis. 331; *Wendt v. Vogel,* 87 Wis. 462, 58 N. W. 764; *Forster L. Co. v. Atkinson,* 94 Wis. 578, 69 N. W. 347; *Boden v. Maher,* 95 Wis. 65, 69 N. W. 980; *John Pritzlaff H. Co. v. Berghoefer,* 103 Wis. 359, 79 N. W. 564; *Coorsen v. Ziehl,* 103 Wis. 381, 79 N. W. 562; *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136.

From the foregoing it will be seen that the trial court should have determined the damages sustained by the respondents' breach of contract in not finishing the building on time. The claims for damages were: first, the stipulated damages of $20 per day; second, expenses of a superintendent during the period of delay; third, damages caused by injury to the building itself by reason of work being done during the winter season which was intended to be done in warm weather. It is considered that all elements of damages suggested, which would be recoverable under any circumstances, fall within those intended to be compensated for by the stipulated damages of $20 per day, if the contract provision in that regard is to be taken literally, and we think it is.

Of course, whether a provision in a contract for liquidated damages is to be enforced literally is to be determined by the intention of the parties to be read out of the language used by them, in the light of all the circumstances and some arbitrary judicial rules well established for that purpose. Such rules are peculiar. They are not very philosophical, nor consistent with legal principles generally, but nevertheless are

so well established that they are presumed to form a part of every contract to which they are applicable, because the parties thereto are presumed to have had them in contemplation in making their agreement. The following cases discuss the rules at considerable length: *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490; *J. G. Wagner Co. v. Cawker,* 112 Wis. 532, 88 N. W. 599. The peculiarity mentioned is well illustrated by the text in 3 Parsons, Contracts, at page 156, often quoted without substantial variance from the original, as was done in *Berrinkott v. Traphagen,* 39 Wis. 219, and *Seeman v. Biemann,* 108 Wis. 374, 84 N. W. 493:

"Parties may contract for stipulated damages at their pleasure, but such damages only as the law says are liquidated according to the artificial rules which have been adopted to justify courts in saying what the parties intended are in fact to be regarded as such damages."

One of the most familiar tests for determining whether it should be held, in such a contract as the one in question, that the parties intended their language to be taken literally, is whether the actual damages, reasonably to be anticipated from the standpoint of the parties at the inception of their contract as the probable result of a breach of it, bear some fair relation to the amount of the damages stipulated for. If the latter is so large that the former cannot reasonably be said to have formed any fair basis for it, then the inclination is to hold that the stipulated damages, so called, are but a penalty, and that the actual damages suffered are the only recoverable loss. Another of the most common tests is whether the character of the property is such as to render the actual damages caused by a breach of the contract very difficult if not impossible of ascertainment with any reasonable degree of certainty. Both of those tests indicate clearly in this case that the parties intended the language fixing the damages for delay at $20 per day to be enforced literally. The character of the building was such that it was very diffi-

cult for any one to say with any reasonable degree of definiteness what the rental value would be. Again, the damages stipulated for were not largely, if at all, in excess of a fair interest upon the investment in the building, when taxes, insurance, and repairs were taken into consideration. Other tests that might be mentioned in determining the question under consideration point the same way as those above suggested.

From the foregoing we cannot see any escape from the conclusion that appellant is entitled to a judgment for the stipulated damages of $20 per day for ninety-two days, less $660 unpaid upon the contract, making $1,180, and is entitled to interest thereon from February 12, 1901. If that seems harsh, the parties suffering the burden have but to reflect that it is but the result of enforcing the contract just as they made it, and the law which acts upon them with seeming harshness one day is the same law they may invoke in their favor upon some other occasion. Our construction of the contract is that the delay for which respondents bound themselves to pay damages at $20 per day refers to working days only. The period of delay was not found by the court. We do not feel warranted in finding that it amounted to more than ninety-two days.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to render judgment in favor of the defendant for $1,180, with interest thereon from February 12, 1901, and with costs as the same may be taxed and allowed according to law.

MOORE, Respondent, vs. DICKSON and others, Appellants.

March 26—April 19, 1904.

Partnership: Who are members: Signature of articles: Intent: Court and jury: Costs: Printed case on appeal.

1. In an action to charge as partners persons whose signatures appeared in a book in which had been pasted the articles of copartnership of a Farmers' Union—some of the signatures being upon sheets inserted by pasting and some upon the pages of the book itself—the evidence (discussed in the opinion) is *held* sufficient as to the signatures on two of the pasted sheets, and also as to those in the book itself, to sustain a verdict to the effect that at all times when such signatures were being made the articles of partnership were annexed to such sheets or book, and that the signers intended to subscribe such articles.
2. As to another of such pasted sheets the evidence is *held* insufficient to show that the articles were annexed thereto at the several times when the signatures on it were made, but sufficient as to some of the signers thereon, though insufficient as to others, to warrant the inference that they intended, at the time of signing, to join the partnership.
3. As to one M., whose name appeared on a small slip pasted in the book, and who denied that he ever signed, the testimony of another defendant whose name was on the same slip, that both he and M. signed at the same time with the declared purpose of becoming parties to the agreement, is *held* sufficient, together with some evidence of the authenticity of M.'s signature, to take to the jury the question whether he signed for the purpose of joining the partnership.
4. A judgment against a number of partners was appealed from by a part of them and was reversed. Upon a second trial a new judgment was entered against all the defendants, and the costs allowed included those taxed and allowed in the former judgment. Some of the former appellants again appealed. *Held*, that as to them, at least, the inclusion of such costs was not error.
5. The printed case herein having included, in violation of Supreme Court Rule VIII, considerable testimony relating exclusively to the liability of nonappealing defendants, and the judge's charge *in extenso*, to which no exception was taken, and there being a large part of it pertaining only to the liability of nonprevailing appellants, taxation of the expense of printing such case is limited to about one third thereof.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Reversed in part, affirmed in part.*

This is an appeal by forty of the defendants from judgment in favor of the plaintiff, rendered upon a second trial of the same action considered in *Moore v. May,* 117 Wis. 192, 94 N. W. 45, where the facts are quite fully stated. Upon the second trial the court, by unexcepted instructions, submitted to the jury the question whether the persons whose signatures appear either upon the sheets of paper or the pages of the book actually subscribed their names to the articles of copartnership knowing they were signing some kind of a contract or agreement at least; or, if they merely signed loose sheets of paper, whether they did so with the intention that they were signing some written contract whereby they bound themselves, understanding such loose sheets were to be attached to the contract; and the jury found a general verdict against all the present appellants. Such appellants, having on the trial moved for the direction of a verdict in their favor and afterwards moved to set aside the verdict and for a new trial, appeal from the judgment against them.

For the appellants there was a brief by *Smith & Griffin, C. W. Graves,* and *Silbaugh & Bennett,* and oral argument by *C. J. Smith* and *Mr. Graves.*

For the respondent there was a brief by *C. M. Butt, Jr.,* and *E. C. Higbee,* and oral argument by *Mr. Higbee.*

DODGE, J. 1. The only question raised on the merits is whether error was committed in refusing to direct a verdict in favor of the appealing defendants and in refusing to set aside that rendered in favor of the plaintiff. This depends, of course, on whether there was any credible evidence tending to establish, as to each of the appellants separately, that he affixed his signature with the understanding and intent to subscribe the articles of copartnership, which, it is claimed,

were mechanically attached either to the sheets of paper or to the book at the several times of signing. A typical contention, common to nearly all of the appellants, is that, upon attempting to purchase goods at the store of the Farmers' Union, they were informed that the rules required non-members to pay a fee of $1 each for the privilege of trading, and the manager requested them to write their names on a sheet of paper, not attached to any contract, for the mere purpose of preserving a list of those who had so acquired that privilege. In view of the very great number of persons and lapse of time between the transactions and the testimony, it is not surprising that there is much confusion and irreconcilable conflict in the evidence. The evidence varies as to the appellants almost with their number, and we have received very little assistance from the briefs, either by way of classifying such appellants or collecting the evidence relating to each of them. A careful examination of the record indicates certain lines of classification. It appears by the testimony of Mr. Butt, who was the counsel and presided over the organization of this so-called copartnership, that he drew up and had printed the form of copartnership articles which are now pasted in this book, and called a meeting of those interested; that, as a result of the conference there held, certain alterations were made, and also certain additions which extended beyond the limits of the printed paper, one line thereof being written upon the top line of the first page of a sheet of legal cap, and that thereupon, immediately following this line, on the same sheet, which was pinned to the foot of the printed form, those present commenced to sign. The number who then signed is left somewhat indefinite, but includes, at most, but two or three of the appellants. Clearly, as to them, Mr. Butt's evidence, if believed by the jury, would justify the conclusion that they affixed their signatures intending to subscribe the agreement. The contract, with the first sheet of legal cap pinned to it as above described, was

then taken to the store, and upon it appears a continuation of names down the first page, over the end and down the second page, then over the connecting fold down the third page and along the fourth page, all in due sequence. It is apparent that the first and second sheets pasted into the book are the two halves of a double sheet of legal cap originally joined at the end. Then there appears pasted in the book by its edge a third half sheet of legal cap, of a different manufacture, with signatures covering one side and about half of the other, finishing with the name of *Louis H. Glenn*. At this stage in the proceedings Mr. Butt again testifies that, some months after the first signing, the manager brought to him the original contract, with these three half sheets of legal cap pinned to it by a single pin, they not being one on the end of the other, but the three sheets together pinned to the foot of the contract. They were becoming dilapidated, and he took a book—the one in evidence—with pages larger than sheets of legal cap, pasted upon one page the contract, with the top line of the first sheet of paper constituting the last line of the contract, on the next page of the book the first half sheet of paper by its edge, so that both sides could be referred to, then the second and third half sheets of paper in the same way. These are designated, the contract as "Exhibit 1," the first half sheet of paper as "Exhibit 2," the second as "Exhibit 3," and the third as "Exhibit 4," in which way we shall refer to them hereafter. The papers disclose numerous pin marks at the end of each, where, according to Mr. Butt, they were fastened. The manager of the store, who took the several signatures, is dead, and his testimony could not be had. Mr. Butt testifies that he was in the store frequently, and looked at the contract, with its attached sheets of paper, in order to see how generally the farmers were signing, and that on all occasions every sheet which he saw with any signatures was pinned to the foot of the contract. He is, however, quite indefinite as to how many sheets he thus saw, and the difficult

point of classification in this case is between Exhibit 3, the second half of the original full sheet of legal cap, and Exhibit 4. We search in vain for enough certainty in Mr. Butt's testimony to convince us that he at any time attempted to testify that with any generality or persistency he saw Exhibit 4 with signatures upon it in a state of annexation to the contract. We are, however, satisfied that his testimony, if believed, would establish a very persistent if not uniform custom that Exhibits 2 and 3 were, during the period that signatures were made on them, kept so annexed. That fact is further confirmed by the testimony of one Benson, who was himself a member, having, as he claimed, insisted that there must be at least 100 names secured. He testifies that he was present at the original organization, and made close and frequent inspection of the process of obtaining signatures in the store until something more than 100 names was reached; he says up to almost 150 at the last time that he made such inspection, after which he did not carefully examine. Now, Exhibits 2 and 3 contain about 125 names. Benson is uncertain as to the number of papers which were attached together, and we feel unable to say that his testimony extends beyond those first two sheets. This generality of custom to keep up annexation is confirmed to some extent by the testimony of one or two other witnesses, but does not extend beyond Exhibits 2 and 3. We have reached the conclusion that the frequency of inspection by Mr. Butt and Mr. Benson, and their evident attention to the subject, with the fact that Exhibits 2 and 3 were both originally attached as one whole sheet, is such that the jury were warranted in the inference that at all times while signatures were being placed upon those two exhibits they were kept attached to the partnership articles. If attached at the time any individual placed his signature thereon, we think, also, the jury would be justified in believing that he signed with reference to such contract, notwithstanding his own testimony to the contrary.

Another classification is of those names, about eighty, which were written upon the pages of the book itself. Mr. Butt testifies positively that, at the time he pasted into this book the printed articles of copartnership and the three sheets of signatures, there was nothing else written in the book. An examination of the method of attachment of the contract to the book, and Mr. Butt's testimony to the effect that it is the same as when he left it, would, we are satisfied, justify a conclusion by the jury that it remained as he placed it and had never been removed; hence that, at all times when any signatures were written upon the pages of the book, the contract was annexed thereto and a part thereof; which fact of itself, though by no means conclusive, would constitute some evidence from which the jury might have concluded that a signer observed such annexation and intended to subscribe to the contract.

This disposes of all except the third sheet—Exhibit 4. As to that we can find no evidence fairly applicable, except that of several men who signed their names upon it, to the effect that when they did so it was attached, although the several appellants and some other witnesses testify that when they signed it was attached to nothing, and was merely a loose sheet lying by itself, disconnected from other papers. The entire possibility, therefore, that all such testimony may be true is apparent. It may have been annexed when one person signed, and disconnected when another. This possibility is rendered almost probability by the appearance of the paper itself, showing numerous pin-holes through the paper, indicating that it had been attached and reattached to something many times. We are unable to discover any evidence of sufficient certainty to carry to the jury the question whether that sheet was attached to the contract at the time any of appellants' signatures were placed thereon, as against their positive testimony that when each signed it the contrary was the case. Hence as to such of the appellants whose liability must

rest alone upon the presence of their signatures upon this sheet, we cannot resist the conclusion that the court should have directed a verdict against the plaintiff.

As to some of them individually, however, there is further evidence, which, while not conclusive, would, we think, suffice to warrant the jury in believing that they did sign intending thereby to join this partnership. One class of such testimony, applicable to all but two of them, is that they attended one or more meetings of the members of the partnership. Testimony was given in several instances to explain away the effect of this attendance, tending to show it to have been casual and not with a purpose of participating nor in recognition of the fact of the party's membership; but the fact of attendance upon a meeting of the members of a partnership is significant, and it was permissible for the jury to weigh that fact against the explanations offered, and to decide whether it was entirely insignificant or evinced a consciousness of membership, which, of course, might be referred back to the fact of signature and lead to an inference of purpose to become a member at the time of signing. This was supplemented in the case of one appellant, *Silas Foster,* by testimony that he at one time admitted that he had signed the partnership papers.

There is one of the appellants who is not within any of the classes above mentioned, namely, *J. W. McLees,* who neither signed upon any of the three exhibits nor upon any page of the book. His name appears in connection with two others upon a slip, evidently taken from a sheet of either foolscap or legal cap, merely wide enough to contain the three names, and which is pasted into the book. This slip was not attached to the contract when brought to Mr. Butt to be put into the book, but has, of course, been pasted in since by some person unknown. *McLees's* defense is that he never signed it; never knew or had anything to do with the Farmers' Union. This is met by the testimony of one Harris, whose name is

also on the slip, next to that of *McLees,* who testifies with much hesitation and uncertainty that to the best of his recollection he and *McLees* signed at the same time upon a piece of paper—whether attached or not he forgets, but for the declared purpose of becoming parties to the partnership agreement. We must hold that this was sufficient, with some evidence of authenticity of the signature as *McLees's,* to take to the jury the question whether he signed for the purpose of joining the partnership.

This analysis of the evidence, which is, of course, but declaratory of our conclusions after weighing very many items of evidence not here commented on, leaves but two of the appellants, namely, *O. L. Stromsland* and *Arndt Johnson,* undisposed of. Their names both appear upon Exhibit 4. Both admit their signatures, but both declare that the paper was in no wise attached or connected with any other paper or agreement when they signed; that no suggestion was made to either of them of the joining of any partnership. *Stromsland* testifies that he wanted to purchase some wire on credit, and that the manager, after learning that this appellant had previously paid his dollar for the privilege of trading, asked him to write his name on this sheet, *Stromsland* understanding that it was only for the purpose of furnishing correctly his name for the purpose of charging the amount of the purchase. *Johnson* testifies, as do most of the other appellants, that he was requested to sign merely in order that the manager might have a list of those who had secured the privilege of trading by paying the dollar fee. Since, as we have concluded, there is no evidence which could have justified the jury in finding that Exhibit 4 was at all times physically annexed to the partnership contract, and since we find no particle of other evidence to contradict the testimony of these two appellants, we must hold that as to them the trial court erred in not directing a verdict in their favor.

2. Error is also assigned because, after the entry of judg-

ment upon this trial, on appeal from the clerk's taxation of costs, the court allowed and incorporated in the judgment the costs taxed and allowed in the former judgment. Indeed, the court seems to have considered the former judgment entirely reversed by the decision of this court, and to have entered a new judgment, not only against the appellants on that appeal, but against all of the defendants, including those who had rested content with the former judgment against them. The only subject, however, in which these appellants are concerned, is the allowance against them of the costs up to the time of the rendition of the first judgment, and upon this we can find nothing of error. The members of this partnership are, of course, liable each for all of the plaintiff's debt, if it be a valid debt of the partnership. He is entitled, upon recovering judgment against any, to recover also the statutory items of costs from the commencement of the suit to the entry of the judgment. It is not suggested that any erroneous items are included, hence we cannot discover that in this respect the plaintiff's recovery is different from that to which he is entitled. Whether those who did not appeal from the former judgment, but rested content therewith, might have ground of complaint by reason of the entry of a new judgment against them containing costs thereafter accrued, is somewhat debated by appellants' counsel, but is not a subject in which his clients have any interest, none of them being in that class.

The printed case contains 172 pages, but therein is printed a considerable amount of testimony relating exclusively to the liability of defendants who do not appeal; also is printed *in extenso* the judge's charge, to which no exceptions were reserved. This is in disobedience to Rule VIII, which requires that the case shall contain an abstract or abridgment of only so much of the record as may be *necessary* to a full understanding of the questions presented for decision. In addition, it is of course true that a very large part of the printed

case pertains to the liability of the nonprevailing appellants, whose costs are not recoverable in their favor upon this appeal. For these reasons, we shall limit taxation of expense of printing case to about one third thereof.

By the Court.—Upon the appeal of *O. L. Stromsland* and *Arndt Johnson,* the judgment is reversed and cause remanded for a new trial. As to all other appellants it is affirmed. In taxing costs in favor of the prevailing appellants, only fifty pages of the printed case will be allowed.

WILLIAMS, Appellant, vs. AINSWORTH, Respondent.

March 26—April 19, 1904.

Malicious prosecution: Termination of proceeding: Injunction: Malicious abuse: Damages.

1. An order that a defendant show cause on a certain day why he should not be restrained from disposing of his property *pendente lite,* and restraining him from disposing of it in the meanwhile, went down because the court was not in session on the day set, and was abandoned. *Held,* that such termination of that proceeding did not give said defendant a right to maintain an action for malicious prosecution before the termination of the action in which that proceeding was had.
2. In an action to recover damages for the malicious abuse of an injunctional proceeding to restrain the sale of property, it appeared that the property could have been sold at prices as high immediately after the termination of the proceeding as before it was in force, and there was no proof that the party restrained could or would have sold it during the time he was so restrained. *Held,* that the jury were properly directed that there could be no recovery.
3. To warrant a recovery in such a case it must appear that the injunction prevented a sale.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The complaint sets up the following facts: The respond-

ent, as assignee of a claim against appellant, commenced an action to recover the sum of $275. In this action respondent alleged, on information and belief, appellant's insolvency; that he was not possessed of property, except a crop of potatoes, from which the indebtedness could be satisfied; and that he, with intent to defraud his creditors, was about to dispose of them and place the proceeds beyond the reach of any judgment. Upon application to a court commissioner for an order restraining appellant from disposing of his property *pendente lite,* he made an order, setting a day for appellant to show cause why an injunctional order should not issue restraining him from disposing of his property. Meanwhile he was ordered not to dispose of it. Appellant alleges that this temporary order was procured for the purpose of hindering, harassing, and injuring him in making a sale of a large quantity of potatoes which he was about to sell. Appellant alleged that the allegations of insolvency and that he threatened to dispose of his property and place the proceeds beyond the reach of any judgment were wholly false, and that this was well known to respondent, and that the order was procured maliciously. It is further claimed that appellant sustained damages because he was compelled to hold the potatoes, and that he was thereafter forced to sell at a lower price, and was subjected to expense and loss in sorting, handling, and shipping them.

After setting up respondent's malicious proceeding without any probable cause, it is further claimed that the complaint states a second cause of action by alleging that the application for an injunctional order was for the purpose of maliciously using the order of the court to appellant's injury, in that respondent procured this restraining order for the purpose and with the intent to harass, annoy, and injure appellant in his property; that she abandoned the proceeding on January 24th, because it was without foundation and just claim in the law; and that appellant, by reason of this ma-

licious and wrongful conduct, suffered damages in being prevented from disposing of his potatoes as heretofore stated.

At the conclusion of the testimony respondent moved the court that it direct a verdict in favor of respondent upon the ground that the action of a malicious prosecution was premature, because the principal suit had not yet been terminated, and, further, that as an action for malicious abuse of process the evidence showed that respondent acted upon the advice of counsel and in good faith, and that no damages were shown to have resulted to appellant from the proceedings taken. This motion was granted on the ground that the malicious prosecution in the principal suit had not been terminated, and if the complaint was sufficient to charge abuse of process no damages had been shown. This is an appeal from the judgment entered upon the verdict as directed by the court.

W. E. Cavanaugh, for the appellant, to the point that the action was not prematurely begun, cited *Fortman v. Rottier,* 8 Ohio St. 548; *Tomlinson v. Warner,* 9 Ohio, 103; *Luby v. Bennett,* 111 Wis. 613; Cooley, Torts (2d ed.) 219; *Alsop v. Lidden,* 130 Ala. 548; *Bump v. Betts,* 19 Wend. 421; 19 Am. & Eng. Ency. of Law (2d ed.) 683, 685, and cases cited in notes; *Ingram v. Root,* 51 Hun, 238, 3 N. Y. Supp. 858. A termination of the action or proceeding by abandonment or from any other cause is sufficient. *Lueck v. Heisler,* 87 Wis. 644; *Pixley v. Reed,* 26 Minn. 80, 1 N. W. 800; *Swensgaard v. Davis,* 33 Minn. 368, 23 N. W. 543; *Cardival v. Smith,* 109 Mass. 158; *Clark v. Cleveland,* 6 Hill, 344; *Fay v. O'Neill,* 36 N. Y. 11.

For the respondent the cause was submitted on the brief of *Thompsons, Reed & Pinkerton.*

SIEBECKER, J. The court directed a dismissal of the complaint for a malicious prosecution, upon the ground that the

action in which it is alleged an order of injunction was maliciously procured without probable cause had not been finally terminated. It appears that this action is still pending. Appellant contends, however, that the abandonment of this particular restraining order is a sufficient termination of the malicious prosecution of the action, and cites us to the case of *Luby v. Bennett,* 111 Wis. 613, 87 N. W. 804, and other cases in support of this contention.

In the case of *Luby v. Bennett* it is distinctly stated that the action which was charged to have been maliciously and wrongfully prosecuted and for which damages were claimed had terminated in a judgment in favor of the party claiming damages for its malicious prosecution, and that nothing remained to be done in that suit aside from the necessary steps to enforce the rights of the parties under the final judgment. We have examined the cases urgently pressed to our attention, and find none wherein it is held that a malicious suing out of an injunctional order in the main action could be made the basis of an action for a malicious prosecution before the final termination of the main suit.

The claim that it is immaterial whether or not the main action, wherein such an injunctional order was obtained, is terminated, does not impress us as well founded. The fact whether or not respondent shall establish that she has a good cause of action in the main suit will clearly have a pertinent evidentiary bearing on the charge of her malicious prosecution of the proceeding for an injunction. The adjudications are to the effect that the proceeding complained of as having been wrongfully and maliciously prosecuted must be finally terminated in favor of the party complaining of the malicious prosecution. Respondent's application for an order to require appellant to show cause why he should not be enjoined from disposing of his property, together with the court's order restraining him in the meantime, went down because

the court was not in session at the time set for the hearing. Under such circumstances, the termination of this proceeding does not constitute a final determination of the legal rights of the parties involved in such application. The application might justly be renewed before final judgment, or the court at the final hearing of the case, upon the evidence adduced, might deem it proper to reinstate the restraining order to protect the rights of the party. Upon the authority of *Luby v. Bennett, supra,* and the cases cited, we find the court applied the correct rule in holding that the action for a malicious prosecution was prematurely brought.

Further error is assigned upon the ground that under the complaint and the evidence the case should have been submitted to the jury to assess damages for the injury sustained by appellant resulting from the malicious abuse of the injunctional proceeding. It is charged that the evidence tended to show a malicious abuse of the proceeding, and that, though regular on its face, it was designed and instituted by respondent with the ulterior purpose of coercing defendant to pay her demand in the action without trial, and by wrongfully and maliciously subjecting him to injury beyond the consequences ordinarily attending the proper use of such proceeding. An examination of the evidence fails to show that appellant sustained any injury from being restrained from disposing of the property during the eight days it was in force. The testimony on the subject of loss of profits on the sale of the potatoes in no way tends to show that it was the result of this order. The fact appears, as held by the trial court, that appellant could have disposed of his potatoes at prices as high or higher immediately after the order went down as during the time it was in force. Nor is there proof that appellant could or would have disposed of them while he was so restrained. To show opportunity to make the sale is not sufficient; it must appear that the order prevented a sale. The

testimony wholly fails to sustain the conclusion that appellant was damaged in the respect claimed by the restraining order. The court properly directed the jury that no grounds of recovery had been established.

By the Court.—Judgment affirmed.

L. J. MUELLER FURNACE COMPANY, Appellant, vs. MEIKLEJOHN, Respondent.

March 26—April 19, 1904.

Sales: Canceling order before acceptance: Time of mailing: Evidence.

1. An order for goods, given to an agent and not to become binding unless approved and accepted by the vendor, may be withdrawn or canceled up to the time of such acceptance.
2. Where in such a case the order was sent to the vendor by mail, the contract became binding at the moment when a postal card of acceptance, properly addressed, was deposited in the postoffice by the vendor, unless the order had been previously withdrawn.
3. The evidence in this case—tending to show, among other things, that a letter canceling an order was received by the vendor at 2 p. m., and showing that the postal card accepting the order was postmarked at a branch postoffice four blocks from his office at 4 p. m. of the same day—is *held* to justify a finding that the order was canceled before acceptance.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action for breach of a contract of purchase of a fire box boiler and two steam radiators, the answer being a general denial. The action was tried before the court, the jury being waived. It appeared by the evidence that the plaintiff is a corporation dealing in steam-heating apparatus

at Milwaukee, and employs several traveling agents; that on the 5th day of August, 1902, one of its agents called on the defendant at Waupaca, Wisconsin, and after some negotiation obtained from him two written orders for steam-heating apparatus at certain fixed prices, one covering a Peoria Fire Box Boiler No. 11, and the other covering two Favorite Steam Radiators, both orders being expressedly subject to approval by the plaintiff; that the agent mailed the orders to the plaintiff from Oshkosh on the afternoon of August 6, 1902, and that they reached the plaintiff in the morning mail August 7, 1902; that on August 6th the defendant mailed a letter to the plaintiff at Milwaukee directing that both orders be canceled, which letter was duly stamped and placed in the post office at Waupaca at 2 o'clock p. m. of that day, so that it would go south at 4:13 p. m., and in due course would reach Milwaukee on the morning of August 7th; that this letter was registered. Mr. L. J. Mueller, Jr., who is the secretary of the plaintiff corporation and attends to the correspondence and the filling of mail orders, testifies that the original orders were received from the agent on the morning of August 7th, and were immediately answered by postal card to the defendant acknowledging their receipt and stating that they would receive prompt attention; that he immediately ordered the boiler and radiators from the factories at Peoria, Illinois, and Springfield, Ohio, respectively, the orders going forward in the 11 o'clock a. m. mail; that the defendant's registered letter countermanding the orders was not received until the afternoon of the same day, and that he immediately answered the same, stating that the order had been accepted and would not be canceled except on payment of the profits of the sale. Upon cross-examination Mueller stated that he did not see the postal card acknowledging the defendant's orders after it was written; that the order clerk wrote it, and that it was copied in the copybook of the firm, and he saw it there and from its position in the book could tell that it was mailed in

the morning mail. The order clerk was not called as a witness. The evidence showed that the plaintiff's office was four blocks from the branch postoffice called "Station A" in Milwaukee. Frank Grahame, superintendent of Station A, was called as a witness, and produced the carrier's record showing the delivery of registered letters on August 7th, and testified from this record and the custom of business that the defendant's letter canceling the orders should have been delivered to the plaintiff at 2 o'clock p. m., or very soon afterward, August 7th. The postal card acknowledging the receipt of the order was introduced in evidence, and bears upon its face the following postmark: "Milwaukee Sta. A August 7 4 P. M."

The court found that the plaintiff did not accept the orders until after it had received the letter of countermand, and hence that no contract was made, and judgment was entered dismissing the complaint, from which the plaintiff appeals.

For the appellant there was a brief by *F. F. Wheeler,* and oral argument by *J. E. Roehr.*

For the respondent there was a brief by *E. L. & E. E. Browne,* and oral argument by *Mr. E. E. Browne.*

WINSLOW, J. It was suggested by the respondent upon the argument that the bill of exceptions contained no exceptions to the findings of the court, and upon this suggestion the appellant's counsel moved that the record be remitted to the trial court for correction of the bill and insertion of the exceptions, or, in case that motion was denied, for leave to dismiss the appeal. Upon examination of the record, however, we find that the bill of exceptions contains exceptions to all of the findings which are in dispute, and that the bill is duly certified; hence the appellant's motions become unnecessary to consider and are denied without costs.

Upon the merits the controversy is in very small compass. The orders given by the defendant to the plaintiff's agent

were by their terms only to become binding if approved and accepted by the plaintiff company. Up to the time of such approval and acceptance they could be withdrawn or canceled by the defendant. The whole transaction being by mail, the acceptance took place and the contract became binding at the moment when the postal card of acceptance, properly addressed, was deposited in the postoffice by the plaintiff, unless the orders had been previously withdrawn. *Washburn v. Fletcher,* 42 Wis. 152. So the only question really is whether the defendant's letter directing that the orders be canceled reached the plaintiff's office before the postal card of acceptance reached the postoffice. The trial court found an affirmative answer to this question, and we are unable to say that this answer is against the weight of the evidence. It is true that the plaintiff's secretary testified that the orders were received in the morning of August 7th and the postal card of acknowledgment was immediately mailed, while the letter of countermand was not received until afternoon; but upon cross-examination he admits that he did not send the postal card himself, that he never saw the original, and only testifies as to the time it was mailed from the position of the copy thereof in the copybook and the custom of the business. On the other hand, the proof is very strong that the countermanding letter was received as early as 2 o'clock p. m., while the postal card of acknowledgment bears the stamp of Station A at 4 p. m. Now, while there is no evidence as to how long letters remain in a city postoffice before they are stamped, it is matter of common knowledge that in city offices the collection and forwarding of mail is very frequent during business hours. Certainly, there is a strong inference, if a letter or postal is stamped at 4 p. m., that it reached the office very shortly before that time. If it reached the office at any time after 2 o'clock, then it was too late, because, as before stated, there was ample evidence to show that the letter of countermand reached the plaintiff's office at 2 o'clock.

There being no direct evidence which fixes the exact time when the postal card was deposited in the postoffice, we think the inference drawn by the trial court from the postoffice stamp, that it was deposited shortly before 4 p. m., was entirely justified, and hence that the orders were countermanded before acceptance.

By the Court.—Judgment affirmed.

LYON, Respondent, vs. CITY OF GRAND RAPIDS, Appellant.

March 28—April 19, 1904.

Municipal corporations: Claims: Appeal from council: Limitation: Injury from defective sidewalk: Pleading: Contributory negligence: Prior knowledge of defect: Evidence: Leading questions: Other defects: Expert testimony: Special verdict: Instructions. Improper statements by counsel: Immaterial errors.

1. Under ch. 68, Laws of 1901, if no notice of the action or non action of a city council upon a claim is served upon the claimant, the right to appeal is not limited to eighty days after the filing of the claim, as provided in sec. 925—60, Stats. 1898.
2. In an action for injury alleged to have been caused by a defective sidewalk, a complaint alleging that a cross-plank of the walk was broken and depressed at the center to the ground, is not insufficient merely because it fails to state the depth of the hole.
3. Where plaintiff knew of the hole in a sidewalk into which she stepped and was injured, contributory negligence in not remembering and avoiding the danger is presumed in the absence of satisfactory excuse for forgetting it.
4. The evidence in this case—to the effect that the accident happened in the evening when it was quite dark; that plaintiff was carrying several things which somewhat occupied her attention; that when near the hole her husband, who was a short distance ahead of her, called to her to hurry up; that this drew her attention to him; and that almost immediately thereafter she stepped into the hole—is *held* such that the jury might reasonably have found that plaintiff was excusable for not remembering the defect.

5. In the direct examination of a party or an interested witness, leading questions suggesting the answer favorable to him should never be allowed except under peculiar circumstances reasonably calling for such departure from the ordinary method. Thus, in this case, after plaintiff had testified in a manner indicating that she was traveling on the walk regardless of the defect and without any reasonable excuse therefor, a question asked by her counsel, "Did the things you had in your arms, as you have described them, have any effect upon your attention?" was leading and improper.
6. Evidence as to a generally defective condition of the sidewalk in the vicinity is not admissible where the particular defect causing the injury—in this case the breaking down of a strong plank—had no relation to such general condition; and where, under such circumstances, the evidence is admitted in a way indicating that it may be considered upon the question of constructive notice of the defect complained of, the error is prejudicial.
7. Opinion evidence should not be permitted to extend to the merits of the controversy, passing upon questions to be submitted to the jury, or to go outside the field of scientific knowledge.
8. In an action for personal injuries alleged to have been caused by a defective sidewalk, a medical expert was asked what, in his opinion, was the cause of the particular diseased condition of plaintiff to which he had testified, basing such opinion on the assumption that her testimony was true and upon his observation and examination of her. *Held*, that a general objection to the question as incompetent did not reach the defect, if there was one, that the question was not sufficiently restricted to prevent the witness from going outside the field of scientific knowledge; and, no motion having been made to strike out the answer that plaintiff's diseased condition was caused by her fall on the sidewalk, there was no error of which defendant can complain.
9. The question whether a defect in a sidewalk had existed long enough to enable the city by the exercise of ordinary care to discover and remedy it before the accident, is a single question, proper to be submitted for special verdict without division.
10. In submitting such question to the jury, the law applicable to the fact should not be embodied therein, as by asking whether the defect had existed long enough to *make it the duty* of the city to discover and repair it.
11. Upon the question, submitted for special verdict, whether plaintiff was guilty of any want of ordinary care which contributed

to the injury, defendant is entitled, upon proper request, to have the jury instructed that a *slight* want of ordinary care on the part of plaintiff which contributed to the injury is sufficient to require an affirmative answer; but if the instruction as requested omits the essential element that the slight want of care *contributed to the injury*, its refusal is not error.

12. In an action for injuries caused by a defect in a sidewalk of which plaintiff had prior knowledge, defendant is entitled, upon request, to have the jury instructed, upon the question of contributory negligence, that plaintiff's knowledge of the defect made it her duty to use greater care than would otherwise have been required of her in order to come up to the standard of ordinary care.
13. Where a special verdict is taken it is error for the court to inform the jury as to the effect of their findings by instructing them in regard to the law applicable to the facts as they may find them.
14. An objection in this case to the conduct of plaintiff's counsel in stating to the jury the effect of certain answers to the special questions having been sustained by the trial court, there was no prejudicial error.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action for a personal injury attributed to failure of defendant to keep one of its sidewalks in a reasonably safe condition for public travel. The complaint, aside from the formal allegations, sets forth the following: March 16, 1901, while plaintiff in the exercise of ordinary care was traveling on the sidewalk in such city in front of lot 10, and near the line between that and lot 11, block 6, McComb's addition to said city, she stepped into a hole in such walk, formed by one of the twelve-inch cross-planks being broken in the center and settling to the ground. By the act of stepping into such hole plaintiff was caused to fall and greatly injure her hip, spine, and the nerves leading therefrom, to her damage in the sum of $5,000. The hole had existed for about three weeks prior to such occurrence. That was time enough for the officers of the city, in the exercise of ordinary care, to have discovered the defect and remedied it. The plank was

broken by reason of a horse, in charge of a city employee, being driven over the walk while operating a snowplow. The walk was not designed, nor at all suitable, for such usage. The man in charge of the horse was acting under directions of the city when the plank was broken, and was working as directed by the proper public officer. March 30, 1901, notice of the injury was given in writing to the defendant as provided by sec. 1339, Stats. 1898. June 4, 1901, plaintiff filed with the city clerk her claim for damages, setting forth the facts required by law, rendering it the duty of the defendant's common council to pass upon the same. A copy of such notice is attached to the complaint. No action was taken upon such claim by the council. After the expiration of sixty days, and without any notice having been served upon the plaintiff by the city as to its nonaction, plaintiff appealed to the circuit court for Wood county, complying with sec. 925—60, Stats. 1898, in respect thereto.

Defendant's counsel joined issue respecting the extent of plaintiff's injuries and the allegations as to its failure of duty respecting the condition of the sidewalk. On the trial there was a demurrer *ore tenus,* which was overruled. At the close of the evidence there was a motion to dismiss the appeal upon the ground that it was not properly taken, and also a motion for a directed verdict upon several grounds. Both motions were overruled. The case was then submitted to the jury for a special verdict upon defendant's motion. The questions submitted, and answers thereto, are as follows:

"1. Did the plaintiff receive physical injury, at the time and place charged, by reason of a fall upon the sidewalk? *Answer* (by the court). Yes.

"2. Was the sidewalk at the time and place of the accident in a defective and unsafe condition for travel? *A.* Yes.

"3. If you answer the second question 'Yes,' had such defective and unsafe condition of the sidewalk existed for such length of time before the accident and injury to the plaintiff as to have made it the duty of the proper city authorities, in

charge of its streets and sidewalks, in the exercise of reasonable care and diligence, to have known of and repaired the same before the accident? *A.* Yes.

"4. If you answer the second question 'Yes,' then was such defective and unsafe condition of the sidewalk the proximate cause of the accident and plaintiff's said injury? *A.* Yes.

"5. Was the plaintiff guilty of any want of ordinary care which caused or contributed to the injury? *A.* No.

"6. If the plaintiff shall be entitled to recover in this action, in what sum do you assess her damages? *A.* We assess the damages at four thousand dollars ($4.000)."

Thereupon various motions were made and overruled, and the rulings excepted to. Such exceptions, with others taken upon the trial, including exceptions to the judge's charge and to refusals to instruct, preserve for review the questions discussed in the opinion. Judgment was rendered in favor of the plaintiff upon the verdict, and defendant appealed.

For the appellant there was a brief by *John A. Gaynor,* attorney, and *B. R. Goggins,* of counsel, and oral argument by *Theodore W. Brazeau.* They contended, *inter alia,* that since ch. 68, Laws of 1901, does not in terms refer to sec. 925—60, Stats. 1898, and contains no repealing clause, the various provisions of said sec. 925—60 are still the law, except where there is a positive conflict between the two statutes. There was no intention to repeal the maximum time limit for an appeal and leave such time unlimited. The language of the act of 1901 refers to affirmative action by the council only, and does not under any circumstances extend the total time for appeal. See *Parker v. McAvoy,* 36 Wis. 322; *Munk v. Anderson,* 94 Wis. 27. The statements of counsel, informing the jury as to the legal effect of their answers in the special verdict, were so prejudicial that the wrong done could not be corrected by any ruling of the court. *Wunderlich v. Palatine Ins. Co.* 104 Wis. 382, 394; *Waldron v. Waldron,* 156 U. S. 361; *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292, 297, 298; *Sasse v. State,* 68 Wis. 530, 537;

Wheeler & W. Mfg. Co. v. Sterrett, 94 Iowa, 160; *Schillinger v. Verona,* 88 Wis. 317, 328; *Gutzman v. Clancy,* 114 Wis. 589, 596–599; *Baker v. Madison,* 62 Wis. 147, 148.

For the respondent there was a brief by *Brennan & Frost* and *D. D. Conway,* and oral argument by *Mr. Conway.*

MARSHALL, J. The appeal was not taken within the time provided by secs. 925—58 to 925—60, Stats. 1898, which were the law of the appellant city and governed the subject, except as modified by ch. 68, Laws of 1901. The first of such sections is to the effect that any claim or demand presented to the city council for allowance, and not acted upon within sixty days thereafter, shall be deemed disallowed; the next is to the effect that disallowance by the common council of any such claim, actual or constructive, shall preclude any action to enforce the same in the absence of an appeal from such disallowance having been taken as provided in the next section, which is to the effect, among other things, that the appeal must be taken within twenty days after the decision of the common council, the time limited therefor under any circumstances being eighty days after the filing of the claim with the city clerk. *Mason v. Ashland,* 98 Wis. 540, 74 N. W. 357.

As the taking of the appeal within the time required by law is essential to the cause of action, if that does not appear by the complaint, where one is served, the same is open to a demurrer for insufficiency. *Koch v. Ashland,* 83 Wis. 361, 53 N. W. 674; *Telford v. Ashland,* 100 Wis. 238, 75 N. W. 1006; *Morgan v. Rhinelander,* 105 Wis. 138, 81 N. W. 132. The complaint here does not show that the appeal was taken within eighty days after the claim was filed, but does show that no notice was served on respondent of action or nonaction thereon by the common council. By reason thereof, it is claimed by respondent's counsel, the time for taking her ap-

peal never commenced to run because of ch. 68, Laws of 1901, which provides as follows:

"Whenever any city council shall have disallowed any claim or permitted the same to be disallowed, wholly or partly, by its failure to act thereon within the time limited by law, the clerk shall prepare a notice of the action or non-action of the council upon such claim . . . for service on the claimant if he reside within such city. . . . If the claimant be a nonresident the clerk shall transmit such notice by registered letter through the mail. Any time limited for appeal by the claimant from the determination of his claim by the common council shall begin to run when such notice is served, or when such registered letter is received."

Notwithstanding the ingenious reasoning of counsel for appellant to the contrary, there seems to be no room for reasonable controversy but that this case is governed by that provision.

A further reason is given why the complaint is insufficient, that the depth of the hole is not alleged. That is not essential, sufficient being stated to indicate that a jury might be warranted in finding, upon satisfactory proof thereof, that the walk was insufficient. The complaint states that a cross-plank was broken and depressed at the center to the ground. That might well have produced a very dangerous condition of the walk. It fully satisfies the test above suggested. Such a defect has no similarity to such as were involved in *Burroughs v. Milwaukee,* 110 Wis. 478, 86 N. W. 159, and *Kleiner v. Madison,* 104 Wis. 339, 80 N. W. 453.

The evidence of the plaintiff was to the effect that she knew of the defect in the sidewalk. That being so, contributory fault on her part in not remembering and avoiding the danger is to be presumed in the absence of satisfactory excuse for forgetting it. That, however, yields easily to evidence showing circumstances reasonably calculated to cause a person circumstanced as respondent was, to momentarily

forget the danger. *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087. The evidence was to the effect that the accident happened about 9 o'clock in the evening; that it was quite dark; that respondent was accompanied by her husband who was walking at the time of the occurrence a short distance ahead of her; that she carried a tin pail full of milk in her right hand, a basin of mince-meat in her left hand, and some fabrics upon which she had been at work, over her left arm; that her attention was somewhat occupied by her burdens; that when near the defect her husband called, "Hurry up;" that such circumstance drew her attention toward him, and that almost immediately thereafter she stepped into the hole and received the injury. That statement is sufficient of itself to answer counsel's contention as to there being no evidence from which the jury could reasonably have found that respondent was excusable for not remembering the defect.

Error is assigned because a leading question to respondent upon her examination in chief was allowed, in relation to a matter vital to her right to recover. After she testified in a manner indicating, in one aspect of her evidence, that she was traveling on the sidewalk on the occasion in question regardless of the defect and without any reasonable excuse therefor, she was asked by her counsel: "Did the things you had in your arms, as you have described them, have any effect upon your attention?" Against objection by appellant's counsel she was permitted to answer. Error was committed in that. The trial court has large discretionary authority as regards leading questions, but should not allow such questions on the examination in chief of a party, as regards one of the matters essential to his right to recover or his defense, there being no circumstance indicating that the truth of the matter, as understood by the witness, cannot be discovered without departing from the usual method of examination. In the examination of a party or an interested witness, leading

questions suggesting the answer favorable to him should never be allowed except under peculiar circumstances reasonably calling for a departure from the ordinary method of giving such party or witness an opportunity to tell his story. There seems to have been no reason for such a departure in the instance under consideration. Whether the error committed was prejudicial to the extent of constituting reversible error will not be determined, since there are other errors that require the judgment to be reversed.

Questions were permitted as to a general defective condition of the walk in the vicinity of the place where the accident occurred. Upon what theory, we are unable to discover. As counsel for appellant contend, such evidence is not permissible in such a case except on the question of notice, and when the specific defect is of such a character that the general condition of the walk would naturally draw attention to the precise defect complained of. *Olson v. Luck,* 103 Wis. 33, 79 N. W. 29; *Conrad v. Ellington,* 104 Wis. 367, 80 N. W. 456; *Shafer v. Eau Claire,* 105 Wis. 239, 243, 81 N. W. 409; *Shaw v. Sun Prairie,* 74 Wis. 105, 42 N. W. 271; *Barrett v. Hammond,* 87 Wis. 658, 58 N. W. 1053; *Viellesse v. Green Bay,* 110 Wis. 160, 85 N. W. 665. Here the unsafe condition of the walk causing the injury had no relation whatever to a general defective condition thereof. It was caused by the breaking down of a strong plank,—one of such strength that it could not reasonably have occurred by any ordinary use of the walk. The plank was twelve inches wide and reasonably sound. To break it required some such occurrence as the one claimed in the complaint, but as regards which no evidence was given upon the trial. How the break occurred was not shown. There was no evidence of actual notice to the appellant of the defective condition of the walk, so respondent's whole reliance in respect thereto was proof of circumstances showing that appellant, by the exercise of ordinary care in respect to the walk, could have

discovered the defect in time to have remedied it before the accident. So the improper evidence was permitted in a way to indicate to the jury that it was to be considered on the question of notice, and therefore could not have operated otherwise than prejudicially to appellant.

A question was allowed to a physician, called to give opinion evidence, as to what caused a particular diseased condition of respondent which he testified she was suffering from, basing such opinion upon the assumption that she had testified truthfully, and what he had seen of her from time to time, including that discovered upon his examination of her person as her physician. In treating this question, we assume that the witness had testified to the facts which had come to his knowledge in the manner indicated. The question was objected to as incompetent. Why was not stated, but probably it was because it contemplated an answer as to whether the injury caused the diseased condition of respondent claimed to exist. That was one of the vital questions in the case for the jury to pass upon. It is not controverted but that it was permissible for the expert to give opinion evidence as regards whether such condition was caused by violence of some kind applied to respondent's person, or by some other immediate producing cause not going to the circumstance which set such cause in motion. The books are full of instances of opinion evidence of that character. *Gates v. Fleischer,* 67 Wis. 504, 30 N. W. 674; *Selleck v. Janesville,* 100 Wis. 157, 75 N. W. 975; *Turner v. Newburgh,* 109 N. Y. 637, 16 N. E. 344; *McKeon v. C., M. & St. P. R. Co.* 94 Wis. 477, 69 N. W. 175; Lawson, Expert & Opinion Ev. 126. Whether an injury of the kind in question is sufficient to produce the particular effects alleged to have been caused thereby is a proper subject for expert evidence. *Smalley v. Appleton,* 75 Wis. 18, 43 N. W. 826; *Block v. Milwaukee St. R. Co.* 89 Wis. 371, 61 N. W. 1101; *Werner v. C. & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416. For the purpose

of interrogating an expert as to whether a particular condition of the human system found to exist at a particular time is referable to violence, blood poisoning, or some other immediate producing cause, the form of the question is often that adopted in this case. *McKeon v. C., M. & St. P. R. Co. supra; Gates v. Fleischer, supra.* "What, in your opinion, is the cause of the condition which you discovered?" or, upon the hypothesis that the physical condition of the person is as stated in the question, the expert is commonly asked to give his opinion as to the cause thereof, meaning thereby, generally, the immediate cause. That is about as far as opinion evidence should be permitted to go other than under exceptional circumstances which strictly exclude any other producing cause than the particular one involved in the controversy. In such cases questions have been permitted which seem to invade the salutary rule that the expert is not to be permitted to usurp the functions of the jury by passing upon issues to be submitted to them. The following are good examples of cases where such questions have been approved, the evidence being uncontroverted in respect to the immediate producing cause, or the opinion being asked upon the hypothesis that the evidence in respect to some particular producing cause established the fact in that regard: *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 204, 78 N. W. 446, 778; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124; *Daly v. Milwaukee,* 103 Wis. 588, 79 N. W. 752; *Stouter v. Manhattan R. Co.* 127 N. Y. 661, 27 N. E. 805; *Davis v. State,* 38 Md. 37; *Flaherty v. Powers,* 167 Mass. 61, 44 N. E. 1074; *Peterson v. C., M. & St. P. R. Co.* 38 Minn. 511, 39 N. W. 485; *McClain v. Brooklyn City R. Co.* 116 N. Y. 459, 22 N. E. 1062; *Turner v. Newburgh,* 109 N. Y. 301, 16 N. E. 344.

In *Maitland v. Gilbert P. Co.* and *Daly v. Milwaukee, supra,* it was said, in effect, that so long as the opinion of the expert is based upon undisputed facts or an assumed state of facts warranted by the evidence in some aspect thereof,

and is kept within the field of scientific knowledge, the question calling therefor is not necessarily objectionable because the tendency of the answer is to pass upon some ultimate question to be submitted to the jury for final solution. However, that is somewhat dangerous ground. *Chicago, R. I. & P. R. Co. v. Sheldon,* 6 Kan. App. 347, 51 Pac. 808; *State v. Rainsbarger,* 74 Iowa, 196, 37 N. W. 153; *Dundas v. Lansing,* 75 Mich. 499, 42 N. W. 1011; *Tice v. Bay City,* 78 Mich. 209, 44 N. W. 52; *Jones v. Portland,* 88 Mich. 598, 50 N. W. 731. The safer way is to go no further than to show by the opinion evidence that the particular circumstances proved or assumed are a sufficient producing cause for the effect complained of. No definite rule can be given accurately defining the limits to which such questions can go. The discretionary authority of the trial judge in that field is somewhat broad. It must necessarily be exercised with regard to the particular facts of the case in hand. Any attempt to give a rule more definite than the one commonly given,—that is, that the opinion evidence must not be permitted to extend to the merits of the controversy, passing upon the very question, or one of them, to be submitted to the jury, or to go outside the field of scientific knowledge,—would not improve it. Of course, when that rule is analyzed, as will be discovered by examining the opinion in *Maitland v. Gilbert P. Co.,* the term, "pass upon the controversy to be submitted to the jury," means pass upon some disputed evidentiary matter upon which the final result in whole or in part depends, or pass upon some matter not within the scope of scientific knowledge.

In attempting to harmonize the adjudications on the subject found in the books, one soon discovers that courts have applied the principles stated so variously that the function of expert testimony and that of the jury many times appear to so blend that the best experts in the science of the law cannot discover where the one ends and the other begins. It

would seem that opinion evidence should be sufficiently restrained that such will not be the case, and it is believed that as regards the cases decided in this court that has, generally speaking, been done. It is easy to understand that opinion evidence should be kept within the field of scientific knowledge; also that whether a particular condition of the human system might be produced by a particular physical disturbance, or whether it was or might be produced by a particular immediate cause, is within such field; but not, generally speaking, easy to see that whether a particular physical disturbance as to one person, attributable to actionable fault of another, is the cause of the bodily condition of such person, may be sought for by direct opinion evidence as to the fact in issue. This court has affirmed that, while an expert may testify as to whether wounds found upon the body of a deceased person caused his death, because that is within the realm of scientific knowledge, he may not testify as to how those wounds were inflicted, because that is not within such knowledge. Also whether drinking of water contaminated by typhoid fever germs will communicate typhoid fever, but not whether partaking of the water from a particular source, though so contaminated, caused such results. *Green v. Ashland W. Co.* 101 Wis. 258, 77 N. W. 722.

However, here the question did not necessarily call for any further answer than the witness's opinion as to the immediate producing cause of respondent's diseased condition, as to whether it was by physical violence or other means, and upon an assumed state of facts warranted in one aspect of the evidence, and the physical examination made by the expert. The objection was general. That did not reach the defect, if there were one, in that the question was not sufficiently restricted to prevent the witness, in answering it, from going outside the field of scientific knowledge. The question, therefore, must be regarded as having been unobjectionable. It was really the answer of the witness which was objectionable,

if anything,—the answer that respondent's diseased condition was caused by her fall upon the sidewalk. If the court's attention had been called to the fact that the question was not sufficiently restricted to certainly fence the expert within his legitimate field, it might have caused the question to be changed, or restricted the same, in effect, by admonishing the witness. Nothing of that kind having been done, and no motion having been made by appellant's counsel to strike out the witness's answer, there is nothing in respect to the matter of which appellant can now be heard successfully to complain.

Complaint is made because the court did not confine each question of the special verdict to a single material controverted fact. If counsel were right as to that, in view of all that has been written here in recent years to improve the practice as to such verdicts and give litigants the full benefits that were designed to be afforded by the special verdict statute, it would constitute serious error; but we cannot agree with counsel that the third question, to which our attention is particularly called, is multifarious. The language thereof is this:

"If you answer the second question 'Yes,' had such defective and unsafe condition of the sidewalk existed for such length of time before the accident and injury to the plaintiff as to have made it the duty of the proper city authorities, in charge of its streets and sidewalks, in the exercise of reasonable care and diligence, to have known of and repaired the same before the accident?"

Counsel says that covers the questions of time, discovery, and repair. But there were no such three questions, properly speaking, at issue upon the pleadings. Counsel mistakes the minor parts of one issuable fact for several such facts. That method of treating pleadings in framing a special verdict would go a great way toward re-establishing the mischiefs once existing to a great extent, by shaping the ques-

tions with regard to mere disputes on evidentiary matters instead of the material issues raised by the pleadings. The matter at issue here, referred to by the third question, was this: Had the insufficient condition of the sidewalk existed for a sufficient length of time before the injury complained of to enable the defendant by the exercise of ordinary care to discover and remedy it? No single element thereof could properly have been separated from the others and made the subject of a question. The court's question might well have been made more concise, in our judgment. It might well have been shortened about one half. Unnecessary words in a question usually sacrifice clearness. It is subject to criticism in that it was not confined to the fact in issue. It will be observed that the law applicable to such fact, upon the same being found in favor of respondent, was embodied in the question. That is as serious a fault with the question as is the giving of general instructions, or any instruction, informing the jury what will be the result of a finding one way or the other. The court should not have asked the jury whether the defect had existed long enough to make it the duty of the defendant to discover and repair the same. What the duty of the defendant was under any circumstances, was not a matter for the jury to pass upon, or to be submitted to them for consideration in any aspect of the case. Had the defect existed long enough to enable appellant by the exercise of ordinary care to discover and remedy it before the accident? That was the sole question for the jury to solve. If they solved it in favor of respondent, it was then the duty of the court to hold as a matter of law that appellant was guilty of a breach of duty to respondent.

Complaint is made because the court refused to instruct the jury, at the request of appellant's counsel, as regards the question on the subject of whether respondent was guilty of a want of ordinary care contributing to the injury she received, that if she was guilty of a slight failure to exercise

ordinary care they should answer in the affirmative. Counsel refer to *Jung v. Stevens Point,* 74 Wis. 547, 43 N. W. 513; *Mauch v. Hartford,* 112 Wis. 58, 87 N. W. 816; *Schroeder v. W. C. R. Co.* 117 Wis. 33, 93 N. W. 837; *Shaw v. Gilbert,* 111 Wis. 165, 188, 86 N. W. 188. Those authorities would rule the assignment of error under consideration in favor of appellant, if the requested instruction was full enough to convey the idea which counsel probably intended thereby. An essential in the rule contended for was obviously omitted; that is, that slight want of ordinary care *contributed to produce the injury.* That was fatal to the instruction.

The court was asked to instruct the jury in regard to the question respecting whether respondent exercised due care on the occasion in question,—that since she knew of the defect in the walk it was her duty to use greater care than she would have been required to use to come up to the standard of ordinary care in the absence of such knowledge. That is a correct principle of law. *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087; *Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913; *Seaver v. Union,* 113 Wis. 330, 89 N. W. 163. It is an important principle in such a situation as that presented by the evidence in this case. It was, in one aspect of the evidence, vital to the defense. Appellant had a right to have such principle in some appropriate way given to the jury. The language chosen therefor by appellant's counsel does not appear to be subject to criticism. Error was committed in refusing to give the instruction.

Complaint is made because the court did not confine the instructions to an explanation of the questions, one by one, so as to enable the jury to understand the same and intelligently make answers thereto; that it instructed the jury quite fully in regard to the law applicable to the ultimate facts, contrary to the repeated rulings of this court on the subject. Counsel's criticism upon the learned court's instructions to the jury seems to be well founded. That method of instruct-

ing a jury where a special verdict is taken, has been most distinctly and repeatedly condemned, as evidenced by the following cases: *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 388, 75 N. W. 169; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 219, 78 N. W. 442; *New Home S. M. Co. v. Simon,* 104 Wis. 120, 80 N. W. 71; *Brunette v. Gagen,* 106 Wis. 618, 82 N. W. 564; *Rhyner v. Menasha,* 107 Wis. 201, 206, 83 N. W. 303; *Sladky v. Marinette L. Co.* 107 Wis. 250, 259, 83 N. W. 514; *Musbach v. Wisconsin C. Co.* 108 Wis. 57, 70, 84 N. W. 36; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26; *Cullen v. Hanisch,* 114 Wis. 24, 37, 89 N. W. 900; *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 448, 457, 90 N. W. 429; *Gutzman v. Clancy,* 114 Wis. 589, 90 N. W. 1081. If all that has been said condemning the practice of instructing juries, in submitting a case to them for a special verdict, respecting principles of law with which they have nothing to do, and which are of no moment in the case till the judge comes to view the facts found to discover the legal result thereof, is not sufficient to wipe out the last vestige of the prejudicial departure in that regard from the legislative plan in enacting the special verdict statute, we cannot hope to aid in that much-desired consummation by saying more on the subject. It is gratifying, however, that few errors in that respect have recently reached this court. That leads to the belief that the much-desired reformation is nearly complete.

Some complaint is made respecting the conduct of respondent's counsel upon the trial, in that in addressing the jury they stated what would be the effect of certain answers to the special questions. The objection of appellant's counsel to such conduct seems to have been sustained. We cannot discover any prejudicial error in what occurred in respect thereto.

Further complaint is made because of the size of the ver-

dict. It seems large. However, if all the evidence on respondent's part as to the effects of her injury be true, it would take quite a large sum of money to adequately compensate her. It is considered that the verdict is not so large as to indicate bias or prejudice on the part of the jury with sufficient clearness, if at all, to warrant a disturbance of the trial court's ruling on that subject. Probably the evidence, with such aids as the court and jury below had which we do not possess, would fairly permit of an honest, unbiased verdict for the amount complained of.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

DUNCAN, Respondent, vs. CITY OF GRAND RAPIDS, Appellant.

March 28—April 19, 1904.

Municipal corporations: Injury from defective sidewalk: Description of defect in notice and complaint: Variance: Amendment: Evidence: Contributory negligence: Instructions: Damages.

1. In an action for personal injuries alleged to have been caused by a defective sidewalk, the complaint described the defect as a hole caused by the adjoining edges of two planks having rotted away. The notice of injury had described it as a hole caused by the fact that a considerable portion of two planks had rotted away *and broken;* and the evidence showed that besides the complete rotting away of a portion of the planks the partially rotted edge of one had been splintered and broken so as to enlarge the hole. *Held,* that the variance was not material, and, though the description in the complaint might apply to another defect in the vicinity, such ambiguity could not be ascribed to any purpose to mislead.
2. An amendment of the complaint, in such case, to conform to the evidence being unnecessary, the allowance of such an amendment was without prejudice.
3. A witness who had made measurements to ascertain the exact location of the defect several days after the injury, and after

the planks had been removed, claimed to be able to locate the place by his memory and by a gathering of rotten wood on the ground which he had observed under the hole while the sidewalk was in place at and before the time of the injury. *Held*, that his testimony as to measurements was admissible.

4. Where an injury was caused by a rotted hole in a plank sidewalk, evidence that there were other similar holes and that the whole walk was old, worn out, and rotten, was admissible.
5. One who, having no prior knowledge of defects, was injured by stepping into a rotted hole in a sidewalk upon a main street of a city, was not guilty of contributory negligence, as matter of law, merely because, as she passed along, she was engaged in conversation and gave no particular attention to the surface of the walk, although she had observed that it was a plank walk and in places was "kind of teetery."
[6. Whether an instruction that, "the whole twelve jurors must approve of and agree to all and every one of the answers made and returned" was error, for the reason that it gave the jury to understand that they could not disagree but that an agreement one way or the other was compulsory, not decided.]
7. Upon evidence tending to prove that as a result of a fall on a defective sidewalk plaintiff received severe external bruises, suffered much pain, was confined to her bed for six weeks, and was disabled from comfortable performance of her household duties for a long time, and also suffered some injury to organs in the pelvic region, it was not an abuse of discretion to refuse to set aside as excessive a verdict for $1,000.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action for personal injuries received August 9, 1901, from a fall on an alleged defective sidewalk on Baker street in Grand Rapids, claimed to have been occasioned by a hole in the sidewalk into which plaintiff stepped while passing along in broad daylight, giving no special attention to the sidewalk, but engaged in conversation. The defect was described in the notice to consist in that two of the planks in the sidewalk were decayed and considerable portions thereof rotted away and broken, so as to make a hole about nineteen inches long by eight inches wide and ten inches deep, enhanced by rotten stringers and looseness of the planks. Claim was filed with

the city clerk November 5, 1901, not acted on by the council, and appeal taken to the circuit court more than eighty days thereafter. No notice of the council's action or nonaction was served on plaintiff. The jury, by a special verdict, found (1) the injury; (2) sidewalk defective and unsafe; (3) for so long a time that the city ought to have known and repaired; (4) the proximate cause of the injury; (5) no contributory negligence; and (6) damages, $1,000. Defendant moved to change the answers to the fourth and fifth questions and for judgment upon the verdict so changed, and also for a new trial, both of which motions were overruled and judgment entered for the plaintiff, from which the defendant appeals.

The cause was submitted for the appellant on the brief of *John A. Gaynor,* attorney, and *B. R. Goggins,* of counsel, and for the respondent on that of *Brennan & Frost* and *D. D. Conway.*

DODGE, J. This case presents several questions which have been considered and disposed of in *Lyon v. Grand Rapids, ante,* p. 609, 99 N. W. 311; the counsel being identical in both cases. It will therefore be unnecessary, as to such questions, to do more than apply the decision reached in that case. Those questions are:

First, the validity of the appeal, taken more than eighty days after the filing of the claim with the city clerk, but before any notice of its disallowance by the common council had been given to plaintiff. That objection must, upon the authority of the *Lyon Case,* be ruled against the appellant, and the action of the trial court in refusing to dismiss the appeal be affirmed.

Next is the criticism of the third question of the special verdict, which was the same in both cases. That, too, is ruled against the appellant by the *Lyon Case,* and we must hold

here that no prejudicial error is well assigned upon that question.

The charge of the court with reference to the third question contains the same information to the jury as to the grounds of liability and the general rules of law under which the city may be charged, and is objectionable and prejudicially erroneous for the same reasons stated in the *Lyon Case.*

One of the most seriously argued assignments of error is based upon the contention that the defect proved was other than that alleged in the complaint and that described in the notice of injury served on the city; and upon this difference it is urged, first, that the notice was thereby misleading; and, secondly, that an amendment allowed to the complaint at the close of the trial, making the description correspond with the evidence, was erroneous. The complaint alleged the existence of a hole of the dimensions mentioned in the statement of facts, caused by the adjoining edges of two successive planks having decayed and rotted away in such manner as to leave such hole, and that the stringers were badly rotted, so as not to hold the nails. The notice ascribed the defect to the fact that two of the planks were decayed and a considerable portion thereof rotted away and *broken*—so much so that an open space and hole therein existed of the said dimensions—and also that the stringers were rotted. The evidence tended to show that the walk was constructed with a longitudinal stringer in the middle, and that in the south half there was a rotting away of the adjoining edges of two boards, said rotting away being complete for two or three inches, and that on the east edge of this hole one of the boards was further splintered and broken down immediately adjoining the middle stringer, so that the hole was some eight inches wide at the widest point along the stringer, running in a triangle with the apex toward the south. It appeared, however, that this splintered and broken-down board or plank, which

was originally two inches thick, had so rotted away underneath that there was only about half an inch of thickness not crumbled away. There was also evidence that in the north half of the walk, in about this same neighborhood, there was a hole between two planks, resulting from the rotting of adjoining edges, but without any breaking or splintering, some four or five inches wide; and some suggestion appears that other similar holes elsewhere in the walk existed. The contention is that the description of the complaint could have applied only to this hole in the north half of the walk, where there was only a rotting away and no breaking down. It will, however, be observed that the original notice and claim both mentioned the fact of the breaking down of part of one of the planks as a characteristic of the defect; hence it is apparent that the notice, instead of tending to mislead into an understanding that the injury resulted from the hole in the north half of the walk, tended directly to call attention to the distinguishing characteristic of the hole in the south half. True, the complaint differed in this respect, and it might have been held more accurately to describe a defect from which the plaintiff did not suffer, instead of the one from which she did, but we cannot think the difference at all material. A hole of the dimensions described, alleged to have been caused by the adjoining edges having decayed and rotted away, is in no wise an incorrect description of one which has been enlarged by the breaking down of the edges of the board as a result of rot and decay, although portions thereof so broken are not entirely rotted and crumbled out of existence. It does not appear that plaintiff had any knowledge of the other holes in the walk, apart from their existence, so that, though complaint might be ambiguous by reason of its possible reference to one or another defect, it cannot be ascribed to any purpose to mislead on her part. We are convinced that the description in the notice accurately applied to the defect proved by the evidence, and that the departure of the

complaint from accuracy of description was so slight as to render amendment unnecessary and therefore, if at all improper, entirely without prejudice.

Objection is made to the admission of certain evidence: First, that of one La Breche as to measurements made to ascertain the exact location of the defect several days after the injury, and after the planks had been removed and carried away by the owner of the abutting premises. He claimed to be able to locate the place of the defect by his memory, and by observing a gathering of rotten wood on the ground, which he had also observed under this hole while the sidewalk was in place at and before the time of the injury. We think this rendered his testimony as to measurements admissible, although the uncertainty bore upon its accuracy and his credibility.

A further criticism of the testimony of this and other witnesses is that they were allowed to testify to the existence of other rotted holes in the walk, most of them of less dimensions, and also to the generally rotted condition of the stringers after the boards were removed. It was proved without dispute that the sidewalk was old and that the under side of this board in question, in common with others, was largely rotted away, leaving but a thin surface of cohesive wood. In the admission of this evidence there was no error. The defect from which plaintiff suffered was an immediate result and concomitant of a generally old, rotted, and worn condition of the sidewalk, similar to some of the other defects described, though slightly greater in degree, and just such as might naturally and reasonably be expected to develop from the worn-out and rotted condition of the whole walk. Under such circumstances, the propriety of proving the generally defective condition has been often approved, and is entirely settled. *Barrett v. Hammond,* 87 Wis. 654, 58 N. W. 1053; *McHugh v. Minocqua,* 102 Wis. 291, 78 N. W. 478.

It is claimed that the trial court should have held the

plaintiff guilty of contributory negligence as matter of law, and amended the verdict accordingly. The evidence is simply that she had no previous knowledge of the existence of this defect or of the condition of the walk; that she passed over it in broad daylight, engaged in conversation with her daughter, carrying a parasol; and that she gave no particular attention to the surface of the walk, although she observed that it was a plank walk and that in places it was not solid—"was kind of teetery," as she expressed it. There is no case in this court which justifies the holding, as matter of law, that it is negligence to pass over a sidewalk upon a main street in a city without carefully observing the condition thereof at each point where the traveler steps, unless she has knowledge of the defects to render it perilous. That a sidewalk is shaky and "teetery" does not necessarily—certainly as matter of law—suggest to every one that its surface is probably broken by holes in which she may step. In the absence of such suggestion, or any other knowledge of defects, one is entitled to assume that a sidewalk upon a principal, traveled thoroughfare in a city is safe enough to pass over in the ordinary manner of foot passengers. *Wheeler v. Westport,* 30 Wis. 392; *Barstow v. Berlin,* 34 Wis. 357. We are not prepared to say, as matter of law, that attention to conversation with a companion and failure to carefully observe every foot of the walk is so variant from the conduct of the ordinary person that it must be held negligence *per se.* The authorities relied on by appellant—*Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913; *Seaver v. Union,* 113 Wis. 322, 330, 89 N. W. 163—were both cases where the plaintiffs had knowledge of the defect and its peril and departed from the safe course in order to bring themselves in contact with it.

It is further assigned as error that the court told the jury: "The whole twelve jurors must approve of and agree to all and every one of the answers made and returned:" contend-

ing that this must or might have been understood as leaving them no opportunity to disagree upon their verdict, but as warning them that an agreement one way or the other was compulsory. We think this is a very strained construction of the language of the court in the connection where used, but need not decide as to whether error was committed, since reversal must result on other grounds, and a different phraseology will very likely be adopted upon another trial.

The remaining assignment of error is upon the refusal of the court to hold the damages of $1,000 excessive. There was evidence tending to prove that, as a result of her fall, plaintiff received severe external bruises, suffered much pain, was confined to her bed for six weeks, largely disabled from comfortable performance of her household duties for a long time thereafter, and that, by reason of the shock or jar, injury resulted to some organs in the pelvic region and the ligaments connected therewith, which had not entirely disappeared at the time of the trial. If the jury believed in the existence of all of the injuries thus described as results of plaintiff's fall, we cannot say, as matter of law, that the verdict is so excessive as to convict the trial court of abuse of discretion in declining to set aside or reduce it.

By reason of the error in instructing the jury as to the third question in the special verdict, there must be reversal.

By the Court.—Judgment reversed, and cause remanded for a new trial.

RUDE, Appellant, vs. TOWN OF ST. MARIE, Respondent.

November 17, 1903—May 10, 1904.

Drains: Application to supervisors: Notice of pendency: Police power: Private uses: Abatement of nuisance: Special assessments: Eminent domain.

1. An application to the *supervisors* of a town, under sec. 1359, Stats. 1898, for the laying out of a ditch or drain is not an application to the *town board* within the meaning of sec. 3187*a*, and the filing of a notice of the pendency of the application is therefore not essential.
2. The construction of ditches or drains under ch. 54, Stats. 1898, is not for merely private uses, but, in the exercise of the police power of the state, to promote the public health and welfare. Certain remarks in *Donnelly v. Decker*, 58 Wis. 461, criticised.
3. The state has power to abate a public nuisance by compelling the drainage of lands which might otherwise create malaria or other diseases; and special assessments therefor, founded on the special benefits conferred, do not constitute a taking of private property for public use without just compensation.
4. The fact that there may be a special assessment of benefits against the owner of land on which a drain is constructed does not take the proceeding out from under the police power and place it under the power of eminent domain.
5. Even if a proceeding under ch. 54, Stats. 1898, results in the taking of one person's land under the power of eminent domain as a means of abating a nuisance on the lands of another, the statute protects all constitutional rights, since it provides for due compensation.

APPEAL from a judgment of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was commenced June 29, 1901, to recover back $41.92 paid by the plaintiff under protest for the amount of special assessment against the plaintiff in the construction of a drain across his lands. It appears from the record and is undisputed or found by the court, in effect: (3) That November 25, 1899, there was duly presented to the supervisors of the town a petition in writing, signed by twenty freehold-

ers residing therein, including one or more of the owners of portions of lands through which the enlargement of the ditch hereinafter mentioned would pass, and through which said ditch was proposed to be laid out, and asking the supervisors to lay out in sections and enlarge a ditch for the purpose of draining marsh and overflowed lands therein pursuant to the provisions of sec. 1359, Stats. 1898; the line of said ditch to pass over and along certain lands of the plaintiff and other lands situated in said town. (4) That the application and petition duly described the land through which the proposed ditch was to pass, together with the route of the same as nearly as practicable. (5) That May 5, 1900, the supervisors of the town duly made out a notice pursuant to the provisions of sec. 1360, Stats. 1898, fixing therein a time and place at which they would meet to examine and decide upon the application and petition, such notice specifying as nearly as practicable the route of the proposed drain and ditch and the several tracts of land through which the same would pass. (6) That the route of said ditch was stated in the notice to pass through the lands of the plaintiff, who was then a resident of the town. (7) That the supervisors, pursuant to sec. 1360, Stats. 1898, duly caused the notice to be served upon each of the resident owners, as therein prescribed. (8) That May 15, 1900, pursuant to such notice and sec. 1361, Stats. 1898, the supervisors did meet at the time and place designated in such notice, and did then and there proceed to examine the location where it was proposed to construct such ditch, and did hear all reasons that were offered for and against the laying out and construction thereof, and did duly decide to lay out and establish the ditch and the enlargement thereof, which said ditch so established and laid out by the supervisors passed through and along the lands of the plaintiff and other lands; and May 26, 1900, the supervisors did duly make an order establishing the route of the ditch, and prescribing the width and depth thereof, and caused a survey

to be made—all pursuant to sec. 1362, Stats. 1898. (9) And did duly make an order pursuant to sec. 1363, Stats. 1898, dividing the ditch into seven sections—the same being not less in number than the several parcels of land which would be directly benefited by the construction of the ditch, and in and by the order, among other things, provided that sections 3, 5, and 7 should be constructed, maintained, and kept in repair by the plaintiff; and did further in and by the order estimate the cost of construction of each section of said ditch, to wit, $10 for section 3, $7.80 for section 5, and $15.60 for section 7. (10) That June 4, 1900, the supervisors did duly make a further order and certificate certifying that the total cost of construction of the ditch was $74.50, and apportioned the cost among the owners of the several parcels of land in the town, each of which tracts would, in the judgment of the supervisors, be directly benefited by the construction and opening of such enlargement of said ditch, and assessed upon each of said tracts of land and the owners thereof the sum of $74.50 in proportion to the benefits to be respectively derived by such tracts of land, and duly assessed against the plaintiff and his lands, for the construction of said ditch, pursuant to sec. 1364, Stats. 1898, the sum of $33.40 as benefits; and the supervisors at the time of making said order entirely failed and refused to award to the plaintiff any damages occasioned by the construction, enlargement, and opening of said ditch through his lands. (11) That the plaintiff, not being satisfied therewith, duly appealed therefrom pursuant to sec. 1366, Stats. 1898; that upon the hearing of the appeal, June 23, 1900, by agreement between the supervisors and the plaintiff, the appeal was dismissed and abandoned. (12) That thereafter, and pursuant to *mandamus* proceedings, the supervisors of the town did duly cause a survey of the ditch to be made, and a map and plan thereof made, pursuant to the provisions of sec. 1363, Stats. 1898, and in all things complied with the provisions of that section. (13) That October 17,

1900, the supervisors did duly make a certificate of additional assessment of benefits to be derived from the laying out of said ditch and enlarging the same in order to pay the additional expenses of said plan and map and survey, and the additional expenses entailed in the completion of the ditch and the enlargement thereof pursuant to sec. 1371, Stats. 1898, and in and by the certificates of additional assessment did assess against the lands of the plaintiff herein, and for the completion and enlargement of said ditch, the sum of $8.52, and in and by the certificate of additional assessment so made did direct the officers of the town, as provided by law, to collect the same as if the same had been levied and assessed under and by virtue of the orders and certificates of assessment so made May 26, 1900, and June 4, 1900, as aforesaid; and by virtue thereof there was duly assessed against the lands of the plaintiff for benefits derived in the laying out and construction and enlargement of said ditch in the aggregate the sum of $41.92. (14) That October 22, 1900, the supervisors of the town did award to the plaintiff for damages which he would sustain by reason of the construction and opening and enlargement of said ditch the sum of $10 damages to the lands of the plaintiff, and in and by said award awarded damages to the owner of each parcel of land damaged as they adjudged reasonable and just. (15) That thereafter said ditch and drain was duly constructed and enlarged, and the supervisors duly tendered to the plaintiff the work of constructing, in accordance with the specifications and within a reasonable time, such sections of such work as were located on the plaintiff's lands as hereinbefore found, at the prices estimated by the supervisors for doing the work so tendered, which tender the plaintiff refused, and refused to construct the same, and therefore the supervisors duly let to the lowest responsible bidder the sections of work in construction and enlargement of said ditch not so disposed of and not so constructed and performed by the plaintiff, after posting no-

tices for proposals therefor, as required by sec. 1370, Stats. 1898, and the contract awarded for the construction of said sections of said ditch was at a price not greater than the original estimate of the cost thereof made by the supervisors, as increased by them by their certificate of additional assessment made October 17, 1900. (16) That January 7, 1901, the amount so assessed for benefits, to wit, $41.92, was collected from the plaintiff pursuant to sec. 1369, Stats. 1898, and that amount was paid by the plaintiff to the town treasurer under protest made by him at the time of such payment. (17) That all orders and papers and plans and specifications made by the supervisors were duly filed in the office of the town clerk. (18) That the supervisors in laying out and constructing said ditch, and in enlarging the same, and in assessing the benefits to be derived therefrom against the plaintiff and his lands, and in all the proceedings in laying out and constructing and enlarging said ditch and in levying such assessment against the plaintiff and his lands, duly followed all the provisions of ch. 54, Stats. 1898, in that behalf, and duly did all things and performed all acts that were necessary to be performed and prescribed by said ch. 54 to authorize them to lay out, construct, and enlarge said ditch. (19) That by reason of the action of the supervisors the plaintiff was indebted to the town and the town treasurer in the sum of $41.92. (20) That no notice of the pendency of any application for the laying out, constructing, or enlarging of said ditch of any kind was ever filed in the office of the register of deeds.

And as conclusions of law the court found, in effect, that the supervisors, in laying out and constructing said ditch and enlarging the same, and in assessing the $41.92 against the plaintiff and his lands, in all things duly acted pursuant to law and to the authority in them vested by ch. 54, Stats. 1898; that the town treasurer had due and legal authority to collect from the plaintiff the $41.92 so paid by him to the town

treasurer; that no cause of action exists in favor of the plaintiff and against the defendant; that the complaint in this action should be dismissed, with costs against the plaintiff. From the judgment entered thereon accordingly the plaintiff brings this appeal.

John J. Wood, Jr., for the appellant.

For the respondent there was a brief by *W. E. Cavanaugh*, attorney, and *Perry Niskern*, of counsel, and oral argument by *Mr. Cavanaugh*.

CASSODAY, C. J. The proceedings in question were in pursuance of ch. 54, Stats. 1898, entitled "Town Drains," which authorizes the draining of "marsh, swamp or overflowed lands." The lands affected by the drain were determined by the supervisors to be a marsh, and were located in two adjoining quarter sections in the defendant town. The plaintiff owned 120 acres thereof, and three other persons respectively owned portions of the other 200 acres. It appears that prior to such proceedings there had been an old ditch, and the proceedings were, in part at least, to widen and deepen the old ditch. There is no claim that the proceedings were not conducted in accordance with the several provisions of the chapter mentioned. The principal contention is that the proceedings were void for failure to file in the register's office "a notice of the pendency of such application," as prescribed in sec. 3187*a*, Stats. 1898. Counsel is certainly correct if that section is applicable, for the section declares that "neglect to comply with" the provisions of that section "shall render all proceedings based upon such application void." Counsel contends that it is applicable, because it requires "every person who makes an application to any court, county board, common council, village board, *or town board*, for laying out, widening, extending, or vacating any street, alley, water channel, park, highway, or other public place," to file such notice of *lis pendens;* and that

the words *"or town board"* were not stricken out by ch. 121, Laws of 1901, until after the proceedings in question. On the other hand, it is claimed on the part of the defendant that such application was not made to the "town board," and that the "town board" did not lay out the ditch in question. The statute required the petitioners to "make application in writing to the supervisors in the town," etc. Sec. 1359, Stats. 1898. The subsequent sections applicable in ch. 54 repeatedly prescribe the duties of supervisors in such matters, but nowhere refer to them as the "town board." Secs. 1360–1371*a*, Stats. 1898. The application in this case was "to the supervisors of the town." This court has, in effect, held that supervisors acting under ch. 54 of the statutes are in the exercise of a police power conferred upon them as public or governmental officers by statute, and not as a town board. *Williams v. Yorkville,* 59 Wis. 119, 17 N. W. 546; *State ex rel. Gordon v. McNay,* 90 Wis. 104, 62 N. W. 917. Hence we must conclude that the application was to them as governmental officers, and not as a town board, so that it does not fall within the letter of sec. 3187*a*, Stats. 1898, to the words of which we have no right to add by construction. The proceeding, therefore, is not void by reason of failure to file notice of *lis pendens* in accordance with that section.

Nevertheless, counsel for the appellant contends that such an application, whether it results in taking land under the power of eminent domain or merely calls into operation the police power, is a proceeding affecting the lands relative to which the application operates, and that one object of the section is to protect subsequent purchasers or incumbrancers. It declares that "no final order, judgment or decree or final resolution or order *taking or affecting* such land, based upon any application therefor, shall have any effect, or be notice to any subsequent purchaser or incumbrancer, unless" such notice of *lis pendens* is filed. Id. Counsel seem to rely upon *Svennes v. West Salem,* 114 Wis. 650, 91 N. W. 121, where

the action was to restrain the village from constructing a drain upon the land of the plaintiff, taken by proceedings for the condemnation of the same, as prescribed by secs. 895–904, 927. See *Lathrop v. Racine,* 119 Wis. 461, 97 N. W. 192, 194. There are other sections of the statutes authorizing the superintendent of highways to enter upon any lands adjoining to or near the highway in his district, and construct such drains or ditches as may be necessary for the improvement or preservation of such highways. Sec. 1236, and other sections of ch. 52, Stats. 1898. Such construction of drains has been regarded by this court as the taking of private property for public use, within the meaning of the constitution, and hence requiring compensation therefor to be made. Sec. 13, art. I, Const.; *Smeaton v. Martin,* 57 Wis. 364, 15 N. W. 403, and cases there cited; *Smith v. Gould,* 59 Wis. 631, 18 N. W. 457; *S. C.* 61 Wis. 31, 20 N. W. 369 The section of the statute in question manifestly requires the filing of notice of *lis pendens* whenever lands are taken for public use by proceedings such as it defines, namely, upon application to such boards as it specifies; but for the reasons stated above it has no application here, for this proceeding was not had before any such tribunal.

Another question discussed more particularly on the oral argument was the constitutionality of this proceeding, called forth by the contention of the respondent's counsel that this was not a taking under the power of eminent domain, because the construction of the drain was for a merely private use. Such contention is undoubtedly based upon certain statements contained in the opinion of Mr. Justice Orton in the case of *Donnelly v. Decker,* 58 Wis. 461, 468, 17 N. W. 389, 391. It is there, among other things, said, in effect, "that such ditching and draining are for no public use whatever in the legal meaning of the term;" that "the primary object is solely to restore such lands to a proper condition for tillage and agriculture by the several owners, and for

their use alone. . . . This is the only object which concerns their use, and that use is strictly private;" that "there is a sovereign power in the state, to be exercised by the legislature, which is outside, and in a sense above, the constitution, called the *police* power of the state." Such statements are manifestly repugnant to other portions of the same opinion. For instance, the opinion quotes a portion of the statute wherein it is, in effect, declared that the supervisors are only authorized to lay out and establish such ditch or drain "if in their judgment such ditch, drain, or enlargement is demanded by or will conduce to the *public health or welfare.*" Sec. 1359, Stats. 1898. So it is said in the opinion: "This legislation may readily be referred to this power by providing for the *public health.*" The authorities cited in the opinion do not justify the statement that such use is private and for the sole benefit of the landowners. In speaking of that case it was said by COLE, C. J., that "the majority of the court rested the authority to enact such a law upon the police power *to protect the public health and welfare.*" *Bryant v. Robbins,* 70 Wis. 269, 35 N. W. 545. In a later case he said:

"The declared purpose of the law in question is to promote the public health and welfare by executing a system of drainage. That is the main purpose and object of the law." *State ex rel. Baltzell v. Stewart,* 74 Wis. 620, 626, 43 N. W. 947.

Under the same section of the statute, and in an opinion by LYON, C. J., it was held by this court that:

"The town supervisors, before proceeding to lay out and establish a ditch, must determine that in their judgment it is demanded by, or will conduce to, the public health or welfare. Such a determination is essential to their jurisdiction, and unless it appears on the face of their proceedings their order laying out and establishing the ditch is void." *State ex rel. Witte v. Curtis,* 86 Wis. 140, 56 N. W. 475.

In the case at bar the supervisors met pursuant to notice ten days before the time fixed for laying out such drain, and

did then and there proceed to examine the location where it was proposed to construct such ditch and the enlargement thereof, and did hear any and all reasons offered for or against the laying out and construction thereof, and declared that in their judgment such enlargement of the ditch was demanded by, or would conduce to, the public health or welfare, and thereupon did decide to lay out and establish the same. The marsh to be so drained was upon the lands of the plaintiff and the three other parties referred to, and the drain was constructed on that marsh.

What has been said about the case of *Donnelly v. Decker, supra,* is not by way of criticising the *decision* in that case, but merely to correct certain misleading remarks of the learned justice who wrote the opinion in that case. In that case he quotes from Cooley this language:

"Similar considerations apply in the case of drainage laws, which are enacted in order to relieve swamps, marshes, and other low lands of the excessive waters which detract from their value for occupation and cultivation, and perhaps render them worthless for use, and are likely at the same time *to diffuse through the neighborhood a dangerous nuisance.* If these may be drained at the expense of the owner by special tax, there can be no doubt of the right of the state to make it his duty to drain them *as a matter of police regulation,* the state coming forward to perform the duty at his expense in case of its not being suitably or expeditiously performed." *Donnelly v. Decker,* 58 Wis. 470, 17 N. W. 389. See, also, 25 Am. & Eng. Ency. of Law (2d ed.) 1181, 1182.

Thus, in a late case in New York, where the defendant was required to provide "suitable appliances to receive and distribute a supply of water for domestic use" on the floors specified in two buildings belonging to the defendant, it was said by Judge PECKHAM, speaking for the court, that:

"Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional though no provision is made for compensation for such disturbances. They do not appropriate private prop-

erty for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria,* or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." *Health Department v. Rector,* 145 N. Y. 32, 43, 39 N. E. 833, 836, citing, among other authorities, 1 Dillon, Mun. Corp. (4th ed.) § 141.

The police power in such cases is usually exerted merely to regulate the use and enjoyment of property by the owner. 22 Am. & Eng. Ency. of Law (2d ed.) 916; Lewis, Eminent Domain (2d ed.) § 187. It is said by the author in this last volume, and in the same section, that:

"A tract of land which requires drainage may be so situated that it can only be drained by a ditch through another tract which does not require it and would not be benefited by it. In such case certainly the drain could only be made under the power of eminent domain."

That is the same in principle as the cases above cited where drains or ditches are constructed upon adjoining lands to improve or preserve public highways.

In the case at bar the basis of the proceedings was the right to promote the public health and welfare. A public nuisance may always be abated. Its abatement may be beneficial to the owner of the land upon which it is situated; and such benefits may be assessed against the owner. The mere fact that such benefits may be assessed against the owner does not take the case out from under the police power and place it under the power of eminent domain. In this case it is quite unnecessary to decide whether the actual physical invasion of the plaintiff's land was a mere regulation of the use thereof to abate a public nuisance thereon, or whether it involved in addition a taking of some portion of the plaintiff's land as a means to abate a nuisance on the lands of others. Even if the latter be true, the proceeding prescribed by the

legislature and followed by the supervisors protects all his constitutional rights, for it awards him due compensation.

There can be no question as to the power of the state to "compel the filling or clearing and drainage of lands which might otherwise create malaria or other diseases." 22 Am. & Eng. Ency. of Law (2d ed.) 923, citing cases from this and other courts. So it is declared that:

"Special assessments founded on the special benefits incurred do not fall under the constitutional inhibition against taking private property for public use without just compensation." 25 Am. & Eng. Ency. of Law (2d ed.) 1172, citing cases from this and other courts.

Here it appears that June 4, 1900, the supervisors estimated the cost of such construction of the drain at $74.50, and October 17, 1900, they ascertained that amount to be insufficient to complete the work, which cost $19 in addition, making the total cost $93.50; and so they determined that the lands drained were proportionately benefited to the amount of such costs, and so assessed against the plaintiff and his lands, as benefits, $41.92, and against the other three parties $51.58, and also made such other parties pay the plaintiff $10 damages to a certain portion of his land. There is nothing in the case to indicate that such assessment against the plaintiff and his lands was in excess of the benefits actually received; and hence it is not objectionable on such ground. 25 Am. & Eng. Ency. of Law (2d ed.) 1172; *Lathrop v. Racine,* 119 Wis. 461, 97 N. W. 192, and cases there cited. Such additional assessment appears to have been authorized by the statutes. Secs. 1363, 1364, 1371. The trial court properly held that the $41.92 was rightfully assessed against and collected from the plaintiff, and hence that he had no cause of action to recover it back.

By the Court.—The judgment of the circuit court is affirmed.

CITY OF ASHLAND, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY and others, Respondents.

February 2—May 10, 1904.

State and federal courts: Prior action.

A state court should not proceed in an action when it appears that a prior action between the same parties and involving the same issues is pending in a federal court.

APPEAL from an order of the circuit court for Ashland county: A. J. VINJE, Judge. *Affirmed.*

This is an action in equity to compel the removal of certain obstructions which it is alleged the *Wisconsin Central Railway Company,* of which respondents are the receivers, placed in Second Avenue West—a public street in the city of Ashland—and praying that the defendants be enjoined from continuing such obstructions.

As stated in the companion case of *Ashland v. Whitcomb,* 120 Wis. 549, 98 N. W. 531, this case was appealed to this court, and a decree rendered therein, in an appeal from orders like the one in question. The facts of the case on the former appeal are reported in 114 Wis. 104, 89 N. W. 886. It now appears, in addition to the facts there stated, that the case was again noticed for trial in the circuit court for Ashland county for the September term, 1902, and that respondents appeared and moved the court at said term to strike the cause from the calendar, which motion was granted.

The order striking the cause from the calendar was based upon the record, files, and affidavits, setting forth the proceedings had in this case, as well as the companion case of *Ashland v. Whitcomb,* showing that the federal court had taken and retained jurisdiction of all questions pertaining to the removal of the obstructions from the streets in appellant city, and that it appeared that the action of *Ashland v. Whitcomb*

was pending, undetermined, in the United States Circuit Court for the Western District of Wisconsin, and that the receivers had brought a cross-bill in the action in the federal court, setting up all the facts alleged in appellant's complaint concerning the obstructions placed in Fourth Avenue West, and also as to all obstructions placed by them in Fourth street and Third and Second Avenues West, of said city, and praying that their possession of the streets be declared lawful, under title to the land, and that the title be declared vested in them, and that appellant city be forever enjoined from interfering or attempting to interfere with the right, title, or possession to such streets; that appellant had appeared and demurred to the cross-bill, raising an issue thereon, which remains undetermined and is pending in the federal court.

For the appellant there was a brief by *F. J. Colignon,* attorney, and *Dillon & Colignon* and *W. M. Tomkins,* of counsel, and oral argument by *Mr. Tomkins.*

For the respondents there was a brief by *Howard Morris* and *Thos. H. Gill,* and oral argument by *Mr. Gill.*

The following opinion was filed February 23, 1904:

SIEBECKER, J. There is no dispute but that the cross-bill filed in the companion case of *Ashland v. Whitcomb,* 120 Wis. 549, embraced the cause of action sought to be litigated in this case. The matters set out in the cross-bill concededly pertain to the rights of the respondents to the possession of and title to the land which appellant claims to be parts of the public streets, and that respondents are charged with having erected and continuing to maintain structures thereon which are alleged to be encroachments in the streets. Respondents assert their right to this property by the authority vested in them under the order or decree of the federal court that they hold it for the court and apply it under the court's direction and administration. Since it was determined in the *Whitcomb Case* that the federal court had assumed and retained

jurisdiction of the cause, it must follow that a prior action is pending in the federal court, wherein all the matters at issue in this case are to be litigated and finally determined between the same parties. Under such circumstances, the state court will defer to the jurisdiction and determination of the federal court, and take no proceeding in the case, unless the action be dismissed and thereby leave the state court free to proceed without conflicting with the jurisdiction of the federal court. We find the order striking the case from the calendar was properly granted.

By the Court.—Order affirmed.

Appellant moved for a rehearing.

The following opinion was filed May 10, 1904:

SIEBECKER, J. Appellant's motion for a rehearing in this case is based upon the ground that the court erred in assuming that the Wisconsin Central Railroad Company and its receivers are parties to this action. The claim is measurably justified, because the writer erroneously included in the statement of the case, when referring to the *Wisconsin Central Railway Company,* the phrase, "of which respondents are the receivers." That phrase is not in accordance with the facts, and should have been omitted. The decision was, however, made upon the facts as they are, and it must stand, and be treated as though the statement referred to were not in the case. That it was inadvertently incorporated in the case is apparent from the other portions of the statement of facts, and the explicit reference to the accurate statement of facts made in the decision when the case was before this court on its former appeal. No new grounds are suggested for a modification of the decision on this appeal. The reasons now advanced were in substance considered in the argument, and weighed by this court in reaching the decision. Since the federal court has assumed and retains jurisdiction of the

cause, as stated in the decision in the companion case, and the respondent railway company having, by its answer, pleaded the pendency of that action, and that the issues *in this action* are the same as those raised by the pending cross-bill and reply *in that action,* and that its claim of right to the streets in controversy is the same as the claim of the receivers urged in their cross-bill, we must adhere to our former conclusion holding that the trial court adopted the correct course in ordering that this action await the determination of the issues under the cross-bill in the federal court.

By the Court.—Motion denied, without costs.

LUDINGTON, Appellant, vs. PATTON and others, imp., Respondents.

March 22—May 10, 1904.

Appeal: Mandate: Judgment in trial court: Wills: Election by widow: Fraud of trustees: Accounting: Insurance: Dower: Interest: Advancements.

1. Where a cause has been remanded by the supreme court with directions stating the measure of relief to be granted, the trial court should enter judgment in strict accordance with such mandate.
2. The mandate of this court on a former appeal directed that a widow be restored to the situation she would have occupied had she duly elected to take the provision made for her by law instead of that made in her husband's will, and had she seasonably been put in possession and enjoyment thereof,—she to be charged with the legitimate expenses that would have belonged to her to pay if the trustees under the will had rightfully cared for her property as trustees of an express trust. It was indicated that, where practicable, she was to receive *in specie* the property which would have come to her had she made said election, and, where that was not practicable, that she should have an equivalent in money. *Held:*

   (1) The insurance with which the widow should be charged in respect to the homestead and other realty is limited, under

such mandate, to the reasonable cost of protecting her insurable interest, i. e. the value of her contingent and dower rights. [Whether in determining the mesne profits of realty, upon the assessment of damages for wrongful detention of a dower interest, or upon the statement of an account between life tenant and remainderman, insurance, as well as taxes and repairs, should be deducted from gross income, not determined.]

(2) The trustees having, by improvement of unproductive realty, obtained a profit therefrom, and being charged with the value of the use of such realty, insurance, as well as taxes and repairs, was properly deducted from the total rent to determine the net rent; and after apportioning such net rent between the value of the improvements and the value of the realty separate therefrom, one third of the amount apportioned to the latter was properly allowed to the widow on account of her dower interest.

(3) It was error to assign to the widow, as her dower interest in said realty, one third of the rents, issues, and profits thereof as the same had been improved by the trustees, the cost of such improvements being treated in another part of the account as personal property in which she was entitled to share equally with the heirs. The realty should be valued, separate from the improvements, as of the time of the accounting, and she should be allowed, for her interest therein, the value of her dower right according to the principles of law applicable to annuities.

(4) The widow being entitled under the mandate to a one-seventh interest in a certain mortgage, the trustees should have been charged in her favor with one seventh of the value of said mortgage at the close of the executorship period, with interest thereafter until the final closing of the account.

(5) In stating the account under the mandate all payments made to the widow, over and above the allowances to which she was entitled during the settlement of the estate, should have been charged to her as of the date thereof, and all payments which ought to have been, but were not, made to her should have been charged in her favor against the trustees as of the time they ought to have been made, with interest upon each item down to the closing of the account.

(6) The trial court having, however, treated separately the period of executorship and the following period of trusteeship under the will, and having struck a balance at the end of the former period, and no objection thereto being made by the parties, that method of stating the account is sanctioned by this court,—all payments during such executorship period, either to

the widow in excess of her proper allowances, or to the heirs, to be charged to them respectively, with interest from the dates of such payments to the end of said period.

3. Under sec. 3959, Stats. 1898, a delivery of property by one person to another having claims upon his bounty is not to be deemed an advancement unless, at the time of such delivery, it is given that character either by a declaration in the writing making the bestowal, or by an acknowledgment in writing by the recipient, or by an expression of the donor in respect to the matter in charging the property to the donee.

4. Thus, sums of money furnished by a testator to his children in his lifetime and charged to them upon his books in the form of loans should not be treated as advancements but as a part of the estate in which the widow, who had elected not to take under the will, was entitled to share equally with the children, although the will provided that "all sums advanced and charged by me to either of my children . . . are to be deemed advancements to said child and to be taken into account" in the distribution of the estate.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed in part, affirmed in part.*

A judgment entered in this cause was reversed as indicated in the report of the case in 111 Wis. 260, 86 N. W. 571. It was there held that the plaintiff—by reason of the fraudulent conduct of A. G. Van Schaick and James E. Patton, executors and trustees under her husband's will, who occupied a position of trust and confidence in respect to her—was entitled to have certain instruments, which they induced her to sign, declared void, and to recover as against them and the property in their hands and the beneficiaries under said will, the benefits *in specie,* or an equivalent thereof, which would have come to her had she duly made her election not to take under such will, which she presumably would have done had she not been deceived by such executors and trustees into taking a different course. The measure of her relief, under the circumstances, was declared as follows:

She must have that part of her husband's estate which

came into the trust as personal property which she would have secured by an election to take under the statute, or have its equivalent, and further have the same *as of the time she would have obtained it in the regular course of the settlement of the estate.* If more than legal interest has been obtained by the trustees for the use of the property in the meantime, she is entitled to the benefit thereof. She must be made good for allowances to which she would have been entitled out of the estate for her support or otherwise had she made her election as indicated, *and have the same as of the time such allowances would have come to her possession in the regular course of the administration of the estate.* She must also have all the other benefits that would have come to her in case of such election, including her proper share of the rents and profits of the real estate of which her husband died seised, including her share of the rent of the Pabst corner, so called, treating such rent as profit issuing out of real estate in which she is entitled to share on the basis of dower. She must account for all the sums of money she has received, and as of the time of the receipt thereof, and she must restore to the estate the Kenwood home in the state of Illinois, which she now occupies, and account for the use thereof. In such accounting the trustees should be allowed their reasonable expenses and charges for caring for the property upon substantially the same basis as if they had administered the same for appellant as trustees of an express trust. The heirs must make restitution of all moneys distributed to them which rightfully belong to appellant, so far as necessary to enable her to obtain the full relief to which she is entitled, and their interests in the estate, now in the hands of the trustees, must be charged with that obligation.

In the proceeding to execute the mandate of this court for the entry of a judgment in accordance with the foregoing, an

interlocutory judgment was rendered in the court below in these words:

Plaintiff "is adjudged to have and be entitled to the same statutory and legal rights in the estate of her husband, Harrison Ludington, deceased, as she would have secured had she, within one year after the filing of the petition for the probate of the will of her husband, filed in the county court for Milwaukee county, in probate, a notice in writing that she elected to take the provisions made for her by law, instead of the provisions made for her in the will of her husband, and that she is entitled to the same dower in his lands, and the same right to the homestead as if her husband had died intestate, leaving lawful issue, and to the same share of his personal estate as if he had died intestate; and that she be entitled to all allowances to which she would have been entitled out of her husband's estate for her support or otherwise, had she made her election as indicated, . . . and that she be entitled to have her statutory rights in the personal property belonging to her husband's estate, or have its equivalent in case the same had been converted by said defendants or any of them; and have the same as of the time when she would have obtained it in the regular course of the settlement of the estate of her husband."

Defendants are "required to account in accord with the foregoing provisions of the decree."

Plaintiff is "required to account for all sums of money she has received," and "for the use of the Kenwood home and restore the same to the executors."

All matters of accounting are referred to F. A. Geiger, Esq., referee.

The result of the reference was that plaintiff was found to be entitled to $86,839.53 and costs; also to the use of the homestead during her widowhood, and in case of her marriage to dower interest therein, and in addition findings were

made respecting her dower interest in the other real estate of which her husband died seised, all of which findings were confirmed by the court. Thereupon judgment was rendered in accordance therewith to the following effect:

(1) Plaintiff is "to be tenant during her widowhood, and upon her remarriage the same to be subject to dower, of the homestead" (describing the same), the defendants "to surrender immediate possession thereof" to her.

(2) Plaintiff has a dower right in certain real estate, describing the same.

(3) Her dower cannot be assigned as to such real estate by setting off to her a portion by metes and bounds.

(4) One third of the rents and profits of such real estate is assigned to her, the same to be had and received by her as tenant in common for life with the other owners of such interest.

(5) "The defendants and each of them are hereby directed to surrender immediate possession thereof to the plaintiff."

(6) That plaintiff recover of the persons named $68,547.19 and costs, making in all $69,856.34, the trust estate to stand charged with the payment thereof.

(7) Further relief may be had according to the findings of the referee or in regard to certain real estate mentioned.

The amount in money adjudged to the plaintiff accorded with that found due her by the referee, less payments made thereon and interest. Various exceptions were taken upon both sides to the findings of the referee and the confirmation thereof, and both sides appealed.

George P. Miller and *Hugh Ryan,* for the plaintiff.

For the defendants there was a brief signed by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and separate briefs by *Jackson B. Kemper,* of counsel, and by *Francis Bloodgood,* of counsel; and the cause was argued orally by *Jackson B. Kemper.*

MARSHALL, J. The questions raised on this appeal must be solved by the mandate of this court upon the former appeal. 111 Wis. 260, 86 N. W. 571. The function of the trial court in the rendition of the present judgment was limited strictly to the execution of such mandate; therefore, no extended discussion of legal questions or citation of authorities need or will be indulged in in rendering this opinion, nor will any attempt be made to determine the meaning of the mandate by rules for judicial construction, it being supposed that resort to such rules is unnecessary. The course which the trial court was directed to take after the determination of the former appeal was carefully fenced about, and the general features plainly pointed out. Mere details were of course omitted, as is usual.

In stating the account as to the homestead in which plaintiff had a contingent interest as to the whole, and otherwise a dower interest, the entire expense of keeping up the insurance was charged to her. That was not warranted by the mandate. In plain language it provided for restoring plaintiff to precisely the same situation she would have occupied had she made her election to take the interest in her husband's estate which belonged to her by law and seasonably been put in possession and enjoyment thereof, she to be charged with the legitimate expenses that would have belonged to her to pay if the trustees had rightfully cared for her property as trustees of an express trust. That included insurance, of course, but only the reasonable cost of protecting her insurable interest, which was limited to the value of her contingent and dower rights. *Hartford F. Ins. Co. v. Haas,* 87 Ky. 531, 9 S. W. 720; *Home Ins. Co. v. Field,* 42 Ill. App. 392. Whether in determining the mesne profits of realty in assessing the damages for the wrongful detention of dower interest or in stating an account between a life tenant and a remainderman, insurance as well as taxes and costs

of repairs should be deducted from the gross income, we do not deem necessary or proper to decide. So the rule on the subject, to be deduced from *Hart v. Hart,* 117 Wis. 639, 94 N. W. 890; *Bonner v. Peterson,* 44 Ill. 253, 261; *Welsh v. London Assur. Corp.* 151 Pa. St. 607, 617, 25 Atl. 142; *Peck v. Sherwood,* 56 N. Y. 615; and *Harrison v. Pepper,* 116 Mass. 288, 44 N. E. 222, cited to our attention, is not material. The rule for this case was settled upon the former appeal. The error in not limiting the insurance expense chargeable to plaintiff on account of her interest in the homestead to such proportion of the total expense of insuring the property as the value of her interest then bore to the entire value, must be corrected.

In adjusting plaintiff's rights as to other insurable real property than the homestead, the referee charged her one third of the expense thereof. That is not in accordance with the mandate for the reason above stated. If plaintiff's interest in the realty had been assigned to her seasonably after her husband's death, she would have received a full third of the rents and profits thereof and been obliged to pay the same proportion of the taxes and repairs. Her insurable interest would have been limited, manifestly, to the value of her life estate in one third of the property, and, obviously, by the terms of the mandate, that is the limit of credit allowance to the trustees in that regard.

In stating the account as to the so-called Broadway property, the value of the use of plaintiff's one-third interest in the unimproved land was determined upon the basis of her having such an interest in the land improved as would be equal to a one-third interest therein unimproved. The entire income from the property was divided accordingly, and plaintiff was charged with a like proportion of the insurance. Complaint is made of that, on the theory that it requires plaintiff to bear a part of the insurance on the improvements, while her interest was in the land only. An examination of

the referee's reasons for proceeding as he did satisfies us that such was not his intention. He acted upon the theory that by the improvement of the realty a profit as to the ground was produced, while otherwise it would have been unproductive; and, as the trustees were to be treated as other fiduciaries in that they were not to be permitted to make a profit off their *cestui que trust,* they were charged with the value of the use of the realty to them, the idea being that the value of such use was the total rent received less insurance, taxes, and repairs. The net rent was apportioned between the value of the realty separate from the improvements, and the value of the improvements, and one third of the former was granted to plaintiff. Plaintiff's counsel do not appear to have objected to the general method adopted for determining the value of the ground rent. It seems clear that, if the method adopted is to stand, the treatment of the insurance matter is a proper part of it. It is quite likely that the referee adopted such method because under the mandate the trustees were not allowed to make a profit off of plaintiff's property, which they might have done, probably would have done, if they had been charged merely with ground rent, the amount thereof being established in the usual way.

Complaint is made because of the treatment of a $4,500 mortgage on property in Chicago, in which plaintiff was entitled to a one-seventh interest under the mandate of this court. There seems to have been but one legitimate way to deal with that, unless plaintiff consented to be a party to the efforts of the trustees to realize thereon otherwise than by enforcing the securities in the ordinary way; and that was to charge the trustees with one seventh of the value of such securities as of the time plaintiff's interest therein should have come to her in the regular course of the administration of her husband's estate. The mandate expressly provided for plaintiff's having the property which would have so come to her *in specie,* or its equivalent in money. That language

was plainly used to the end that plaintiff might secure property of the estate as the same existed at the time of the death of her husband, so far as practicable, and that otherwise an equivalent in money might be rendered to her, thus putting her in the same position she would have occupied had she received the property when it should have reached her in the due course of the settlement of her husband's estate. Proof ought to have been made of the value of the $4,500 mortgage at the close of the executorship period and one seventh thereof charged to the trustees at that time, the same to bear interest thereafter with other funds held by the trustees, belonging to the plaintiff, down to the final closing of the account.

In stating the account, yearly payments to the plaintiff were deducted from the principal sum due her at the time she received such payment, though there was accrued interest out of which the same might have been paid in whole or in part. That was a departure from the command of the mandate awarding to the plaintiff the benefits that would have come to her had she taken regularly under the statute and as of the time such benefits would in that event have reached her in possession, and requiring her to account for money or property received by her, and "as of the time of the receipt thereof." The language of the mandate in respect thereto seems to us entirely unambiguous. The words "as of the time" plainly indicate that plaintiff was to be allowed interest from the time she should have received the principal of her property had she taken under the statute. In no other way, it seems, can effect be given to such words. All payments made to the plaintiff should have been charged to her as of the time they were made, with interest on each such payment from the date thereof to the closing of the account; and all payments that should have been made to her but were not, should have been charged to the trustees as of the date they should have been rendered to her, and with interest upon each

sum from the date of the charge down to the closing of the account.

Complaint is made on the part of the trustees because interest was allowed plaintiff on the $10,678.17 found due her at the end of the executorship period, on account of certain matters, from such end to the closing of the account, and also allowed her interest upon the balance between what was paid and what should have been paid to her for each year, down to such closing. We observe nothing wrong in that by which defendants can reasonably be said to have been prejudiced. So far as the court went in that regard the result is in harmony with the previous mandate, though, as before indicated, the method of stating the account as regards interest was improper.

The referee held that from and after the entry of the judgment plaintiff was entitled to a one-third interest in the Broadway property as improved, and, in harmony therewith and the finding that such interest could not be set off by metes and bounds, the judgment assigned to her one third of the rents, issues, and profits of the property to be received by her as tenant in common with the other owners according to sec. 3871, Stats. 1898. The learned referee and the court seem to have recognized that plaintiff had no such interest in the property in fact, that her interest was limited to one third of the use of the real estate aside from the value created by the expenditure of money thereon by the other owners, such use to terminate with her life; but concluded as indicated, since, as said by the referee, "there is no way under our statute of making any other allotment or admeasurement, and in the absence of such statute an attempt to decree a future interest would be wholly uncertain as to such parties and would be on a shifting basis." The court adopted that view. Both court and referee seem to have overlooked the fact that the mandate of this court, not any statute, or any supposed difficulty at-

tending the enjoyment by plaintiff of her property in the future, was the guide to be followed in determining what interest therein should be awarded to her. Though the mandate provided that plaintiff "must have all the benefits that would have come to her in case she had elected to take under the statute," whether such benefits should be in the form of estate property *in specie,* or an equivalent therefor, was left as a matter of detail to be worked out by the trial court, the inference plainly being that where realty was found to be in the possession of the trustees so circumstanced that plaintiff's dower interest therein could be assigned to her substantially the same as it could have been originally, that course would be taken, and in case of realty sold by the trustees or so changed by them as to render it impracticable to so assign dower to her, she should be awarded an equivalent in money upon the same basis that dower rights are computed and paid in case of a sale of realty and a division of the proceeds where partition can only be made in that way. It was said in the opinion, in effect, that the judgment would not necessarily restore to plaintiff property *in specie* in all cases, but would so bear upon the trustees *in personam* as to compel them to do justice to her at all points. In the light of that feature of the opinion, as well as others, the mandate in its terms, and in spirit throughout, indicates plainly that plaintiff should have restored to her property *in specie* where that can be done justly, and otherwise that she should have an equivalent thereof in money.

If some guide, outside the mandate of this court, were needed for dealing with the Broadway property, it could well have been found, and in harmony with such mandate, by referring to ch. 123, Stats. 1898, which provides that in case a person in possession of land, holding adversely by color of title asserted in good faith, makes improvements, and subsequently is judicially found to be wrongfully possessed thereof, the interest of the true owner is to be limited to the

value of the land less the improvements. While there was relievable fraud in this case, there was no actual bad faith in the sense the term is used in such chapter. For that reason this court provided that the trustees in some respects should be treated as having rights, as regards plaintiff, of trustees of an express trust.

If a further guide was needed in the matter under discussion, it could have been found, in harmony with the mandate of this court, in ch. 134, Stats. 1898, which provides that on a sale of land for the purpose of partitioning the same, if it is impracticable to make partition in any other way, any vested dower interest involved may be extinguished by the sale, and in lieu thereof payment be made to the dowress of a sum equivalent to her interest in the land fixed according to principles of law applicable to annuities, she consenting to such payment; otherwise, by investing one third of the entire proceeds of the land for her benefit for life.

Further guidance in harmony with such mandate could have been found in sec. 2176, Stats. 1898, which plainly indicates a legislative policy that in any event a dower right is not to be regarded as reaching beyond one third of the annual mesne profits of the property involved, as the same existed at the time the right becomes vested, with such increase thereof as springs from natural causes. In the case at hand the proper way to have treated the matter was to have valued the realty as of the time of the accounting, less the improvements made thereon by the trustees, and to have awarded to plaintiff, for her interest therein, the value of her dower right according to the principles of law applicable to annuities.

The learned counsel for plaintiff endeavored to justify the judgment awarding plaintiff a dower interest in the improvements placed on the Broadway property by the trustees, after according to her one seventh of the cost of such improvements, by referring to the ancient rule that if the heirs, after the death of the husband, improve the real estate of which

he died seised and its value is thereby increased, the widow will be entitled to her dower of the land so improved, without any allowance to the heirs on account of the expenditures, citing 1 Washb. Real Prop. (6th ed.) 476; 2 Kerr, Real Prop. § 1007; and *Powell v. Monson & B. Mfg. Co.* 3 Mason, 376. In that counsel seems to have fallen into the same error as that committed by the learned court, of going outside the mandate of this court to find support for the judgment, while tested thereby it must be condemned. How can an award to plaintiff of a one-third interest for life in property as improved, from and after the date of the judgment, be justified, when at such date it included a large sum of money treated in another part of the account as personal property in which the plaintiff was entitled to share equally with the heirs of Mr. Ludington? The mere statement of the question shows the utter absurdity of the proposition. Certainly, no such injustice to the heirs was contemplated by this court in framing the mandate upon the former appeal, nor can be found therein.

The foregoing covers the propositions submitted on plaintiff's appeal.

Between January 1, 1883, and the death of Mr. Ludington, he furnished his children various sums of money, charging the same to them upon his books in the form of loans. Defendants claim that such apparent indebtedness constitutes advancements and should have been treated as such, instead of as part of the assets of the estate, in which plaintiff was entitled to share on an equal basis with Mr. Ludington's children. The will contained this language, following the provision as regards the distribution of the testator's estate:

"In such division no advancement or gift to any of my children prior to January 1st, 1883, is to be considered or taken into account, but all sums advanced and charged by me to either of my children since January 1st, 1883, are to be deemed advancements to said child and to be taken into ac-

count in such distribution. In case of any partial distribution of my estate among my children, my executors and trustees are authorized to deduct any advancements to any child in instalments, as they may deem just, so that none of them shall be deprived of a fair annual income for his or her support."

Counsel for defendants claim that such language characterized the accounts in question as advancements under sec. 3959, Stats. 1898, which reads as follows:

"All gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made or if charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant. If the value of the estate so advanced shall be expressed in the conveyance or in the charge thereof made by the intestate or in the acknowledgment of the party receiving it such value shall govern in the division and distribution of the estate; otherwise it shall be estimated according to its value when given, as nearly as the same can be ascertained."

We cannot adopt that contention. The statute is mandatory and must be enforced as written. *Pomeroy v. Pomeroy,* 93 Wis. 262, 67 N. W. 430. It clearly contemplates that a delivery of property by one to another, the latter having claims upon the former's bounty, is not to be deemed an advancement unless it is given that character at the time of such delivery, either by a declaration in the writing making the bestowal, or by an acknowledgement in writing at that time by the recipient of the bounty, or by an expression of the donor in respect to the matter in charging the property to the person receiving the same. It needs no argument to show that the accounts in question are not thus characterized by the reference thereto in the will, the making of which was in no way directly connected therewith. The trial court rightly treated the accounts as assets of the estate to be treated the same as other property in making the division between the heirs and the plaintiff.

Points made by defendants' counsel as to the $4,500 mortgage on property in Chicago, heretofore referred to, are sufficiently answered by what has been said on plaintiff's appeal.

Defendants' counsel suggest that the mandate of this court did not contemplate that plaintiff would be awarded for her dower interest a legal estate in the lands of which her husband died seised. What has already been said sufficiently answers that proposition. The plain purport of the mandate, as before indicated, is that plaintiff should be awarded *in specie* all property she would have received had she seasonably elected to take under the statute, where that is practicable; but where it is otherwise, by reason of the way the property has been handled by the trustees, she should have an equivalent.

A further point is made that interest was not charged to plaintiff upon the money received by her during the executorship period over and above her widow's allowances. That seems to be well taken, and strictly within the letter of the mandate. The language thereof, "she must account for all money she has received and as of the time of the receipt thereof," covers the matter. There can be no very good reason for mistaking the import thereof. All sums of money given to plaintiff prior to the decision of this court upon the former appeal, over and above what she was entitled to for allowances during the settlement of the estate, should have been regarded, in stating the account, as at interest against her, the same as money in the hands of the trustees, which she should have had, was to be regarded at interest in her favor.

Counsel for plaintiff answer that by saying: By not charging plaintiff on sums she received during the executorship period over and above her widow's allowances, she was simply treated the same as the heirs, since large sums of money were paid to them during such period and no interest was charged thereon. What would be the general re-

sult of following the mandate strictly as regards this matter, we do not know. It provides that interest shall be both charged and credited, and of course it must be followed. In the division of the property, if the general plan of the accounting is to stand as regards considering the period the property was handled by the executors separate from the time they handled the same as trustees,—and no serious objection seems to be taken to that on either side,—interest should be in effect charged against each of the seven parties upon all sums received during such period from the date of the receipt thereof to the end of such period, this not to include the amount which belonged to plaintiff as her widow's allowances during the settlement of the estate.

The foregoing covers all the points that need attention upon either appeal. The result is that judgment must be reversed so far as it awarded to plaintiff a dower interest in the Broadway property, and so far as relates to the statement of the account whereby it was found that there was due plaintiff, June 1, 1903, $69,856.34, and the cause be remanded for a restatement of the account in accordance with the previous mandate of this court and as pointed out herein. To the end that no room may be left for future mistakes in the matter, and to the end that upon the promulgation of this decision this litigation may be brought to a speedy determination, these specific directions are given as to the manner of stating the account:

1. Treat the estate as an entirety, not breaking the same up into parcels and stating an account for each, further than to preserve the referee's classification and findings as to the amount chargeable to the trustees each year for plaintiff's interest as to each class, so far as the same are consistent with this opinion.

2. Continue the plan of treating the executorship period by itself, striking a balance at the end thereof and computing interest thereon down to the closing of the account.

3. Treat as verities the various amounts found chargeable to the trustees for plaintiff's interests in the estate for each year as to each class of property, as indicated in the finding, except as the same need modification to correct errors in respect to insurance matters, payments made to the plaintiff for any year not to be deducted from her credits till the closing of the account, as hereafter indicated.

4. Construct the account for the executorship period ending January 1, 1893, by charging the trustees as of that date $10,678.17 as per finding 1; $335.02 on account of the Broadway property as per finding 2; $12,811.44 with interest at the legal rate from October 1, 1891, to January 1, 1893, as per finding 3; plaintiff's part of the mesne profits of realty treated in finding number 5, down to January 1, 1893; one third of the value of the mortgage mentioned in finding 8 as of January 1, 1893; $927 on account of income from the homestead as per finding 9; and so on through all the findings. Having gathered into the account all items to be debited to the trustees down to January 1, 1893, in manner aforesaid, including plaintiff's interest in the mortgage mentioned, make such additional charges to the trustees as may be necessary to correct the insurance matters in accordance with the opinion, to such date. Credit the trustees with all payments made to plaintiff during the executorship period in excess of her widow's allowances, with interest thereon from the date of the payments respectively, to January 1st, aforesaid. Add to such interest interest on all sums paid to the Ludington heirs during such period from the dates of the payments respectively to January 1st aforesaid, and charge the trustees with one seventh of the aggregate thereof. Make such further charges to the trustees and credits to them as may be necessary to bring the account down to the end of the executorship period, and make the balance thereof the first item in the final statement, charging the trustees therewith and with legal interest from January 1, 1893, down to the closing of the account.

5. Having done as indicated, charge the trustees each year subsequent to the executorship period with the various amounts belonging to the plaintiff for each such year, according to the findings as corrected in respect to insurance matters, and as of the date in each year when the same would have ordinarily been realized by plaintiff in possession had she controlled her property, and charge them with legal interest on each of such amounts from the date of the payment thereof down to the closing of the account.

6. Credit the trustees with all sums for which plaintiff should account according to the findings, not involved in the foregoing, with interest on each item from the time of the payment thereof to the date of closing the account.

7. Value plaintiff's dower interest in the Broadway property as of the date of closing the account in respect thereto as per finding No. 2, and charge the same to the trustees as of that date, with interest thereafter to the date of the final closing of the account.

The account between plaintiff and the trustees, constructed in manner aforesaid, will substantially show the amount she is entitled to in money in accordance with the previous mandate. To such balance interest from the date of closing the account to that of the final judgment, should be added to the costs, pursuant to sec. 2922, Stats. 1898. If the record were sufficiently full to enable us to do so, we would relieve counsel and the trial court from the labor of restating the account and would modify the judgment heretofore entered, in accordance with this opinion, so as to now end this litigation. However, it is thought that with the directions given the parties interested can, without judicial aid, complete the matter ready for the final decree, though it will be left open for such assistance, if necessary, including the taking of further testimony if that be found essential.

By the Court.—The money judgment in plaintiff's favor, and that part of the judgment awarding her a one-third interest for life in the Broadway property, are reversed. The

order confirming the referee's report, so far as inconsistent with this opinion, is reversed. The cause is remanded with directions to restate the account between the plaintiff and the trustees, as indicated in the opinion, the latter to be charged with the money value of the former's interest in the $4,500 mortgage and her dower interest in the Broadway property, with interest, as therein indicated, and to enter an amended judgment embodying that part of the former judgment not disturbed upon these appeals, and the result of the new accounting. The judgment appealed from, so far as inconsistent herewith is reversed upon both appeals, and so far as consistent herewith is affirmed upon both appeals. No costs will be allowed in this court to either party. Each will pay the clerk's fees upon one appeal.

HEBBE, Respondent, vs. TOWN OF MAPLE CREEK, Appellant.

March 26—May 10, 1904.

Highways: Injuries: Defect in side track: Accessibility and degree of travel: Stone near track: Special verdict: Form: Double question: Evidence: Photographs.

1. To entitle a traveler driving on a so-called side track of a highway to recover for injuries sustained by reason of a defect therein, it is not necessary that such track should have been "equally accessible" or have been "apparently as much traveled" as the main track. It is sufficient that it was reasonably accessible to travelers and appeared to have been recently traveled to a considerable extent as a part of the public highway.
2. The form of a special verdict is very much in the discretion of the trial court.
3. A question, submitted for a special verdict, as to whether a stone constituted a defect in the highway which was the proximate cause of an accident, was double, but being answered in the affirmative under instructions clearly explaining it, there was no prejudicial error.

4. A stone may constitute a defect in a highway, though it is not within the traveled track, if it is so near such track that the wheels of passing vehicles driven with ordinary care are likely to come in contact with it, and is dangerous to such vehicles and persons therein.

5. A witness familiar with a certain locality may state whether a photograph is a substantially correct representation of that place as it existed at the time of an accident, though he was not present when the photograph was taken.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was commenced June 1, 1900, to recover damages for injuries to the plaintiff's wife and property, caused by an alleged defect in the public highway on the evening of December 3, 1899. The complaint contains the usual allegations in such cases. The answer consists of admissions, denials, and counter allegations to the effect that the plaintiff was guilty of contributory negligence, and that the alleged defect was outside of the traveled portion of such highway. At the close of the trial the jury returned a special verdict, to the effect (1) that an accident did happen at the time and in the vicinity of the place stated, resulting in injuries to the plaintiff's wife and property; (2) that the so-called east track of the highway was of sufficient width to accommodate the public travel at the time and place in question; (3) that the so-called west track was reasonably accessible to travelers going south at said time and place; (4) that said west track at the time did appear to have been recently traveled to a considerable extent as a part of the public highway; (5) that the stone complained of did constitute a defect in the highway at the time and place in question, which was the proximate cause of the accident; (6) that such defect in the highway had existed for such length of time that, in the exercise of ordinary care, the officers of the defendant town ought to have known of and repaired it before the accident; (7) that the plaintiff was not guilty of any negligence or want of ordi-

nary care and prudence at the time and place in question which promimately caused or contributed to the injuries complained of; (8) that they assessed the plaintiff's damages at $145.65. From the judgment entered upon such verdict for the amount stated, with costs, the defendant brings this appeal.

For the appellant there was a brief by *Humphrey Pierce* and *A. M. Spencer,* attorneys, and *Pierce & Lehr,* of counsel, and oral argument by *J. E. Lehr.*

For the respondent there was a brief by *Weed & Van Doren,* and oral argument by *R. N. Van Doren.*

CASSODAY, C. J. It is undisputed that the highway at the place in question ran in a northerly and southerly direction; that at the place of the accident there were two tracks—one on the easterly side of the highway, designated as the main track, and the other on the westerly side of the highway, which for convenience we will call the side track; that the defect complained of consisted of a stone at or near the easterly side of the side track; and that such side track ran into the main track several rods north of where the stone was located. There is evidence on the part of the plaintiff tending to prove that he had been in the habit of passing over the road in question twice a year; that on the morning of December 3, 1899, he took his wife and four children in a big lumber wagon, with four-inch tires, and spring seat on the box, drawn by two horses, from his home, some miles distant from the place of the accident, and went on a visit to his father's home, some miles distant from that place; that in going he drove past the place of the accident upon the main track mentioned; that there was no snow on the ground at the time; that he returned with his team and wife and children just at dusk in the evening; that, at or about the time he reached the junction between the side track and the main

track, he met a team coming from the south on the main track, and in consequence he turned onto the side track and drove on an ordinary trot, and, after going a few rods on the west track, his wagon struck a stone on the left-hand side, and threw him out on the right-hand side, and the lines were jerked away from him, and his horses ran about a quarter of a mile, and there struck a telegraph pole; that his wife was thrown out and was rendered unconscious during that night, and the wagon was broken.

1. Error is assigned because the court submitted to the jury the question: "Was the so-called west track *reasonably accessible* to travelers going south at said time and place?" The objection is based upon the use of the words "reasonably accessible," and the court was asked to substitute in place of them the words "equally accessible." This is urged upon the ground that a traveler upon a public highway has no choice in the selection of traveled tracks unless they are "equally accessible," or unless he selects the one most accessible, and that, if he takes the one least accessible, then he is precluded from recovering any damages by reason of any defect therein. In support of such contention, counsel seem to rely upon *Kelley v. Fond du Lac,* 31 Wis. 179. It was there held that:

"Towns are not bound to keep highways in a suitable condition for travel in their whole width, and their liability is limited primarily to damages caused by defects in the traveled track. If a traveler, without necessity, or for his own pleasure or convenience, deviates from the traveled track, which is in good condition, and in so doing meets with an accident from some cause outside of such track, the town will not be liable for resulting damages."

Soon after this court held that "a town is liable for defects anywhere in the worked and traveled part of a highway, although the same may be wide enough for three or four teams abreast." *Matthews v. Baraboo,* 39 Wis. 674. True,

it was said by Mr. Justice LYON in a later case, cited by counsel, that:

"To relieve itself from liability when the public travel, or some part of it, has diverged from the prepared track, and has formed another track, equally accessible to travelers, and apparently as much traveled as the other, the town should give some reasonable notice to the public traveling there that the use of the side track is unauthorized." *Cartright v. Belmont,* 58 Wis. 370, 373, 374, 17 N. W. 237.

But that is very different than to hold that there can be no liability unless the side track is equally accessible to travelers, or where it is reasonably accessible to travelers. In that case the side track extended a considerable distance north and south of the place of the accident, and "had never been opened for travel by the town, but was usually used by the public in traveling the highway when the plaintiff was injured." 58 Wis. 371, 17 N. W. 238. Nevertheless the court said that:

"There may be two or more authorized traveled tracks along the same highway, and, where there are more than a single track, and nothing has been done by the authorities to indicate to travelers that any of the tracks are unauthorized, the traveler may well assume that travel is authorized upon any of them." 58 Wis. 373, 17 N. W. 238.

And it was there held "that there was sufficient testimony to be submitted to the jury on the question whether the town employed reasonable and proper means to warn travelers that the side track was unauthorized, and that they were required to take the graded track." 58 Wis. 374, 17 N. W. 239.

The decision in that case supports the ruling of the trial court in submitting the question mentioned. See, also, *Schuenke v. Pine River,* 84 Wis. 669, 54 N. W. 1007; *Bills v. Kaukauna,* 94 Wis. 310, 68 N. W. 992; *Wells v. Remington,* 118 Wis. 573, 95 N. W. 1094, 1096. In this last case it was urged with much force that, had the deceased taken the other track, the accident would not have happened. We

must hold that there was no error in submitting the question mentioned, nor in refusing to modify it as requested.

2. Error is assigned because the court submitted to the jury this question:

"Did the said west track at the time appear to have been recently traveled to a considerable extent as a part of the public highway?"

The court was requested to submit to the jury a question as to whether the west track was "apparently as much traveled as the east track." The objection complained of is sufficiently answered by what has been said. As this court has often observed, the form of the special verdict is very much in the discretion of the trial court. We perceive no abuse of such discretion in submitting the two questions mentioned. Certainly they were not faulty or misleading.

3. After what has been said, and the submission of the two questions as indicated, it is unnecessary to add that there was no error in refusing to submit to the jury the question whether the west track at the time in question was "equally accessible to travelers and apparently as much traveled as the east track."

4. For similar reasons, there was no error in refusing to instruct the jury to the effect that the plaintiff had no right to presume the west track to be a part of the traveled portion of the highway, and to pass from the east track upon it, unless it "was equally accessible to travelers and apparently as much traveled as the east track."

5. Error is assigned because the court submitted to the jury this question:

"Did the stone complained of constitute a defect in the highway, at the time and place in question, which was the proximate cause of the accident?"

It is claimed that this question is double and misleading. The question is certainly double. It called upon the jury to determine whether the stone constituted a defect in the high-

way, and also whether it was the proximate cause of the accident. Both questions were coupled together. The court told the jury that the question "involves two distinct propositions, both and each one of which are to be considered before answering it." They were further told, in effect, that, if they should find that the stone was a defect in the highway, then they should inquire whether or not such stone was the proximate cause of the accident, and that if they found that the stone was a defect, and that it was the proximate cause of the accident, then they should answer the question "Yes." Had the jury answered in the negative, it would have been impossible to determine whether they found that the stone did not constitute a defect in the highway, or that it was not the proximate cause of the accident, or that it was neither a defect nor the proximate cause of the accident. But the jury answered the question in the affirmative. To do so, they necessarily found that the stone constituted a defect in the highway, and also that it was the proximate cause of the accident. This being so, the fact of the question submitted being double was not a prejudicial error. The reason for this is sufficiently pointed out by Mr. Justice DODGE in *Shaw v. Gilbert,* 111 Wis. 183, 184, 86 N. W. 188.

6. In charging the jury upon that question, they were told, in effect, among other things, that if the west track was not a part of the traveled track of the highway, apparently opened to the use of the public for the purpose of travel, then the stone in question was not a defect in the highway. Such portions of the charge were certainly favorable to the defendant. But exception is taken because the court also charged the jury upon that question to the effect that if the west track was a part of the traveled portion of the highway, and the stone in question was in such traveled track, or so near the same as to be likely to come in contact with the wheels of vehicles passing that point, being driven with ordinary care, and if such stone was dangerous to such vehicles and persons

therein, then such stone was a defect in the highway. We perceive no reversible error in such portions of the charge. This court has repeatedly held that, "to render a town liable for injury by reason of a defective highway, the object or defect causing the injury need not be within the traveled track, provided it is so connected with the traveled track as to render the same unsafe and inconvenient to those traveling thereon." *Slivitski v. Wien,* 93 Wis. 460, 462, 67 N. W. 730, and cases there cited; *Carpenter v. Rolling,* 107 Wis. 559, 563, 83 N. W. 953; *Wells v. Remington,* 118 Wis. 573, 95 N. W. 1094, 1096; *Jenewein v. Irving,* 99 N. W. 346.

7. Counsel objected to the competency of the plaintiff to testify whether a photograph presented to him was a picture of the stone, unless he was present when the photograph was taken. The court ruled that if the witness was familiar with the locality, as appeared, then he might state whether a given picture was a substantially correct representation of it at the time of the alleged accident, no matter when it was taken. We perceive no error in such ruling, and we find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

OLSON, Respondent, vs. PEABODY, Appellant.

April 19—May 10, 1904.

Justices' courts: Replevin: Affidavit: Mistakes in names of parties: Affidavit for removal: Parties: Clerical error in judgment.

1. An affidavit for replevin, naming "Charles Oleson" as plaintiff, is not insufficient because signed "Charley Olson," where there is no doubt, upon the record, that the person who subscribed the affidavit, as certified by the justice who issued the warrant, was the person whom such justice intended to name in the body of the affidavit.

2. That an affidavit for replevin stated defendant's first name as "Wimmiam," while in the warrant and in fact it was "William," is not fatal to the jurisdiction of the justice, where the defendant duly appeared in the action.
3. An affidavit for the removal of a cause from a justice on the ground of prejudice, filed by one defendant for and on behalf of himself and the other defendants named in the title thereof, is sufficient for the removal, as against the affiant, whether such other defendants were parties to the action at the time or not.
4. A mere clerical error in the findings and judgment in replevin, in mentioning the cattle seized on the writ and delivered to plaintiff as "six head" instead of seven, is not fatal to the judgment, where the true number appears by enumeration in the findings, and plaintiff is adjudged to be entitled to their possession.

APPEAL from the judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

It appears from the record that September 9, 1901, the plaintiff made and filed with a justice of the peace his affidavit to the effect that he was lawfully entitled to the possession of the personal property therein described, consisting of nine head of cattle, of the aggregate value of $150, and that the same had been unjustly taken and unlawfully detained by the defendant *Wm. H. Peabody,* and that the same had not been taken for any tax, nor seized on execution or attachment against the plaintiff. Thereupon the justice issued a warrant of replevin for the apprehension of such property, and said *Peabody* and Fred and Art Stockman were ordered to appear and answer. The defendant *Peabody* appeared before the justice, and filed an affidavit for and on behalf of himself and the other defendants for the removal of the cause to the county court on the ground of prejudice, and the cause was thereupon removed accordingly, September 13, 1901. The cause being at issue and tried in the county court, judgment was entered therein in favor of the plaintiff October 7, 1901. From that judgment the defendant *Wm. H. Peabody* appealed to the circuit court. July 1, 1902,

the circuit court, on motion of Fred and Art Stockman, dismissed the cause of action as to them, without costs, but refused to dismiss it as to the defendant *Wm. H. Peabody.*

A jury having been waived, the cause was tried by the circuit court, and at the close of the trial the court found as matters of fact, in effect, (1) that June 17, 1901, one Peter A. Boe and wife executed a promissory note, wherein they agreed to pay to the plaintiff $200, with interest at five per cent., (2) and, to secure the same, they executed and delivered to the plaintiff a chattel mortgage covering the property described in the affidavit of replevin, and other property; (3) that such property was at the time owned and in the possession of Peter A. Boe; that the mortgage was duly filed June 17, 1901; (4) that at the time of the service of the warrant of replevin no part of the note and mortgage had been paid, except $7 indorsed thereon August 27, 1901; (5) that September 5, 1901, the defendant *Wm. H. Peabody,* under and by virtue of an execution issued upon a judgment in favor of the Stockmans and against Peter A. Boe, levied and seized "one spotted red and white cow two years old, one spotted red and white steer one year old, one red steer one year old, one spotted red and white bull one year old, two heifer calves—one black and one spotted red and white—one spotted red and white bull calf, and one black bull calf;" that the property so seized by *Peabody* was of like description, mentioned in the chattel mortgage; that at the time of such seizure said property was in the possession of Peter A. Boe, and subject to the chattel mortgage; (6) that thereupon the plaintiff duly demanded the property so seized on execution from the defendant, but he denied the plaintiff's right to the same, and claimed the chattel mortgage to be invalid, and refused to return the cattle or deliver them up to the plaintiff; (7) that September 10, 1901, the plaintiff replevied all of the property so seized upon execution, "with the exception of the spotted red and white cow

two years old" mentioned and described in the mortgage; that after the trial in the county court, upon the giving of a proper undertaking by the plaintiff, the sheriff delivered to him all of the property so replevied, and the plaintiff now has the same in his possession; (8) that the value of the (six head of) cattle so seized by the sheriff under the writ of replevin, and so delivered to the plaintiff, was at the time of taking the same $84; that the value of the two-year-old spotted cow was at the time of seizure $35; (9) that there is no proof that the defendant unjustly took or unlawfully detained the red cow three years old, mentioned and described in the complaint; (10) that the damages sustained by the plaintiff by reason of such seizure and refusal to deliver upon demand, and for the detention to the time of delivery, is six cents.

And, as conclusions of law, the court found in effect (1) that September 5, 1901, the plaintiff had a lien upon said (seven head of) cattle so taken and seized by the defendant under the execution, and became, and was, and still is, entitled to the possession thereof, for the purpose of satisfying such lien; (2) that after the demand so made upon the defendant he unlawfully detained all of the property seized by him upon execution, and still continues to unlawfully detain the same; (3) that the plaintiff should have judgment herein for the possession of the (six head of) cattle so delivered to him by the sheriff, and for the return of the two-year-old red and white spotted cow so seized by the defendant, and, in case the return of said last-named cow cannot be had, then the plaintiff is entitled to judgment against the defendant for $35—the value of that cow; (4) that the plaintiff is entitled to recover six cents damages for the detention of said property; (5) that the plaintiff is entitled to his costs and disbursements herein.

From the judgment entered upon such findings accordingly, the defendant *Wm. H. Peabody* brings this appeal.

E. B. Kinney, for the appellant, contended, *inter alia,* that if the justice had jurisdiction it was lost by removing the action to the county court on the affidavit filed. That affidavit follows the warrant, but is not entitled in the action in which plaintiff's affidavit was made, in the action docketed by the justice, or in the action in which the judgment now appealed from was entered. It shows that it was intended to be used in an action in which the affiant was a codefendant with two others, and that was the action that was asked to be removed. The county court obtained no jurisdiction of the subject matter. Sec. 2836, Stats. 1898; *Widner v. Wood,* 19 Wis. 190; *Hager v. Falk,* 82 Wis. 644; *Henckel v. Wheeler & W. Mfg. Co.* 51 Wis. 363.

James A. Frear, for the respondent.

CASSODAY, C. J. It is claimed that the justice never got jurisdiction of the action, because the affidavit for the writ of replevin was not in compliance with sec. 3733, Stats. 1898. One criticism is that in the body of the affidavit the plaintiff is mentioned and referred to as "Charles Oleson," whereas it is signed "Charley Olson." It is difficult to tell from the record whether it is signed "Charley" or "Charles," but we will assume, for the purpose of this case, that it was signed "Charley Olson." The affidavit was sworn to before the justice who issued the warrant, and he certifies that it was "subscribed and sworn to before me [him]" on the day mentioned. There can be no doubt but that the person who so "subscribed and swore to" the affidavit was the person whom the justice intended to name in the body of the affidavit. The affidavit appears to have been made by the plaintiff in his own behalf, within the meaning of the section of the statute mentioned. Counsel's argument is based in part upon some supposed docket entries of the justice. But there is no bill of exceptions, and we do not feel at liberty to assume the existence of facts not of record in determining the question

thus presented. Another objection to the affidavit is that it mentions "Wimmiam" H. Peabody as the person who unjustly and unlawfully detained the property, instead of "*William*" *H. Peabody,* as mentioned in the warrant. It is enough to say that the defendant *William H. Peabody* thereupon appeared in the cause and made an affidavit for the removal of the same, and that such affidavit was entitled "*Charles Olson,* Plaintiff, vs. *William H. Peabody,* Fred Stockman, and Art Stockman, Defendants."

2. The substance of the affidavit for removal is given in the foregoing statement, and there can be no reasonable doubt but that it was sufficient for the removal, whether the Stockmans be regarded as parties to the action at the time it was made or not. We find nothing in the record to indicate that the justice did not have jurisdiction to issue the writ of replevin, nor that the county court did not acquire jurisdiction by virtue of the removal.

3. It is claimed that the description of the property is insufficient, and that the judgment only determines the right to a part of the property—contrary to the statutes in such case made and provided. Secs. 3742,3744, Stats. 1898. If such claim is well founded, then, of course, the judgment must be reversed upon the authorities cited by counsel. *Young v. Lego,* 38 Wis. 206; *Carrier v. Carrier,* 71 Wis. 111, 36 N. W. 626. The affidavit for the writ of replevin, which constitutes the complaint herein, describes nine head of cattle, including "one red cow three years old"; and by the ninth finding the court found that the defendant did not unjustly take nor unlawfully detain the "red cow three years old" mentioned and described in the complaint. That finding exonerated the defendant from all liability on account of the "red cow three years old." That left eight other head of cattle to be disposed of by the findings and the judgment. By the fifth finding of fact the court found that September 5, 1901, by virtue of the execution mentioned, the defendant

levied upon and seized the other eight head of cattle, described, while in the possession of Peter A. Boe and subject to the chattel mortgage. By the seventh finding the court found that September 10, 1901, by virtue of the writ of replevin, the sheriff seized and took into his possession "all of the said property so seized upon the execution by said *Peabody, with the exception of the spotted red and white cow two years old.*" and finally delivered the same to the plaintiff, who still retained possession as therein found. Thus it appears that the sheriff seized on the writ of replevin, and took possession and turned over to the plaintiff, seven of the eight head of cattle mentioned in the fifth finding, and that he failed to get the "one spotted red and white cow two years old" mentioned in that finding. Nevertheless, the eighth finding mentions the cattle so seized by the sheriff on the writ of replevin—which were seven in number—as "six head," contrary to the finding itself. But such clerical error should not vitiate the finding or judgment. It is therein sufficiently found that the cattle actually seized by the sheriff on the writ of replevin—which were seven in number—were of the value of $84, and that the "two-year-old spotted cow" was of the value of $35. Such clerical error runs through the conclusions of law, and is found in the judgment. But it appears, from the findings and judgment, that the plaintiff is entitled to have and recover the possession of the "one two-year-old red and white spotted cow" mentioned, and six cents damages for the taking and detention thereof, with costs, or, if delivery thereof cannot be had, then that the plaintiff recover $35, the value of such cow as found, and such costs and damages; and it was therein further ordered and adjudged that the plaintiff was "entitled to the possession" of the "cattle so delivered to him by the said sheriff, as appears in the findings in the case," and which are therein erroneously mentioned as "six head." Certainly, the defendant is not aggrieved by such clerical error in the

findings and judgment. Sec. 3048, Stats. 1898; *McGregor v. Pearson,* 51 Wis. 122, 8 N. W. 101; *Hogan v. La Crosse,* 104 Wis. 106, 80 N. W. 105; *Larson v. Oisefos,* 118 Wis. 368, 95 N. W. 399. We find no reversible error in the record.

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1. A person cannot sue upon one cause of action and recover upon another; but that does not apply where the cause of action is not proved as alleged, yet a liability is established within the scope of the subject stated, and everything in respect thereto is fully litigated so that an amendment might properly be granted conforming the pleadings thereto; nor militate against the rule that, a court of equity having taken jurisdiction of a subject matter for one purpose, which is not fully established on the trial, a liability notwithstanding being established upon a full hearing, within the scope of such subject, the court will retain the case and grant such relief as is within its jurisdiction to afford. *Harrigan v. Gilchrist* (111) 145, 442

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1. The term "adverse party" in sec. 3049, Stats. 1898, relating to the service of notice of appeal to this court, does not mean merely the opposite party on the record. It does not extend beyond parties having some substantial interest in sustaining the decision challenged by the appeal. *Harrigan v. Gilchrist* (1) 130, 207

2. In an action to reach the property applicable to the payment of the indebtedness of an insolvent corporation, a judgment having been rendered against parties charged with wrongfully appropriating such property or some part thereof, it being conceded that the corporate indebtedness greatly exceeds the corporate assets, and the corporation having for all business purposes ceased to exist, though yet having a legal entity, it is not an adverse party within the meaning of the appeal statutes, in a controversy upon appeal between the creditors and the judgment debtors. *Id.* (2) 130, 210

Undertaking: Security for costs, etc. See CONSTITUTIONAL LAW, 1, 2.

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3. If several parties join in one notice of appeal, stating that they severally and separately appeal, the effect is the same as if there were as many notices of appeal as appellants; and to make the notice effective as to any appellant an undertaking in the sum of $250 under the statute is requisite to each. *Harrigan v. Gilchrist* (3) 130, 210

4. An undertaking in form to answer in the sum of $250 for the defaults of several defendants constitutes one obligation. *Id.* (4) 130, 211

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5. The giving in good faith of a proper notice of appeal, and the recognition thereof by the proper officer by returning the record to the supreme court, confers jurisdiction upon that court to allow any defect in the appeal to be cured within the time limited by statute for taking the same; and if the only defect is in failing to serve the statutory undertaking for $250, it being filed for the use of the respondent, it confers jurisdiction to hear the appeal without the error being cured, counsel for respondent not seasonably objecting. *Harrigan v. Gilchrist* (6) 130, 212

6. If the omission to give a proper undertaking to perfect an appeal happens through mistake or accident, it is proper for the trial court to allow such omission to be cured; and if the omission is not attributable to either mistake or accident, so called, but is excusable in any view of the matter, it is competent for the supreme court to allow the defect to be cured if application be seasonably made therefor. *Id.* (8) 131, 221

7. A new undertaking in such a case being a full compliance with the statutory requirements as to each appeal, and having been filed before the motions to dismiss were heard, it is proper to deny such motions with or without costs to the moving parties, as justice requires. *Id.* (9) 131, 222

8. Respondents' counsel having treated the appeals as properly taken, with knowledge or full means of knowledge of the facts up to a time when a change of position on their part would be prejudicial to appellants, and having given no reason for not calling the court's attention to the defects at an earlier date, and such defects having been promptly cured as soon as called to the attention of appellants' counsel, no terms should be imposed as a condition of denying respondents' motions and allowing the appeals to stand, except that appellants be required to submit the same upon the merits when reached in their order. *Id.* (10) 131, 222

9. While the supreme court has power to permit necessary corrections in the appellate procedure after notice of appeal duly given, although the record filed is not such as to give it jurisdiction to decide the merits, and while it will pursue a general policy of liberality in that regard, yet such corrections will be permitted only in furtherance of justice, considering the effect on both parties, and when the mistakes or omissions to be corrected are excusable. *Milwaukee Trust Co. v. Sherwin,* 468

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10. On appeal from an order reciting that it was based on affidavits of numerous persons the return of the clerk merely certified that the papers returned were "all the papers filed" in the action. *Held.* that this was insufficient, under sec. 3050, Stats. 1898, to give the supreme court jurisdiction, and the appeal must be dismissed. *Milwaukee Trust Co. v. Sherwin,* 468

Orders reviewable on appeal from judgment.

11. Where the question to be determined and the judgment in a *mandamus* action would have been the same whether the case

was submitted pursuant to a stipulation or upon a motion to quash the alternative writ, and the judgment of dismissal was in fact based upon the granting of said motion, an intermediate order striking out the stipulation is not reviewable on appeal from the judgment, because it is not an "order which involves the merits and necessarily affects the judgment," within the meaning of sec. 3070, Stats. 1898. *State ex rel. Risch v. Trustees,* 44

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12. Where both parties have treated an action as one to recover for ordinary negligence, this court will so treat it, although the complaint charges that the negligent act was also reckless, wilful, and malicious. *Turtenwald v. Wis. Lakes I. & C. Co.* 65

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13. In appellant's brief the particular parts of the trial judge's charge which are claimed to be prejudicially erroneous should be specifically pointed out, with the reasons for citing them to the attention of this court. *Radichel v. Kendall,* 560

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14. In considering whether findings of fact made by a trial court should be disturbed on appeal, these rules apply:

a. Such finding should stand unless so against the weight of evidence as to indicate, clearly, want of proper consideration of the evidence, mistake by overlooking material evidence, or prejudice, or some other improper cause.

b. It is incumbent on the party alleging fraud to establish it by clear and satisfactory evidence.

c. The first rule does not apply where the result is reached by the trial court through a misapprehension of the law.

d. The first rule applies with more or less significance according to the presence and importance of the elements upon which it is based.

e. The admission of improper evidence is to be deemed immaterial upon appeal unless it clearly appears that but for such evidence the finding would probably have been different.

f. Unless the contrary clearly appears, improper evidence taken under objection will be presumed to have been given no weight. *Harrigan v. Gilchrist* (66) 139, 312–314

Same: Recitals of fact in order.

15. Recitals of fact in a judicial order, the truth of which must be presumed, in the absence of evidence to the contrary, to have been known to, or established to the satisfaction of, the judge making such order, should not be held to be untrue or fraudulent if they may be reasonably viewed in a light which will avoid such result. *Harrigan v. Gilchrist* (104) 144, 424

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16. Ordinarily, where the only question raised on an appeal is whether the findings of fact are against the clear preponderance of the evidence, and that question must be answered in the negative, the filing of a decision in writing in strict compliance with sec. 2410, Stats. 1898, is all that is required or advisable. *Kraniger v. Schmidt,* 82

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17. Permitting a party to make further proof on rebuttal after both sides had rested will not be held ground for reversal unless shown to have been a clear abuse of discretion and to have substantially prejudiced the adverse party. *Radichel v. Kendall,* 560

New trial or direction of judgment?

18. A mere motion in the trial court for judgment notwithstanding the verdict, without a motion to change the findings of the verdict to conform to the evidence, does not make it proper for the supreme court, on reversing the judgment entered upon the verdict, to dispose of the case finally without a new trial. *Standard Mfg. Co. v. Slot.* 14

19. Where the trial court erred in refusing to change the answer to a question in a special verdict, this court on appeal may direct that such change be made and judgment rendered accordingly, without a new trial. *Ehleiter v. Milwaukee,* 85

Mandate: Judgment in trial court. See EXECUTORS, 5.

20. Where a cause has been remanded by the supreme court with directions stating the measure of relief to be granted, the trial court should enter judgment in strict accordance with such mandate. *Ludington v. Patton,* 649

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21. When several defendants severally appeal from a judgment rendered against them, and succeed, there is not necessarily as many prevailing parties as there are individual appellants for the purpose of the taxation of costs in this court, under sec. 2949, Stats. 1898. Such of the appellants as are united in interest are to be deemed as constituting but one prevailing party, though they may have separate appeals. *Harrigan v. Gilchrist* (117) 146, 449

Same: Printing.

22. The printed case having included, in violation of Supreme Court Rule VIII, considerable testimony relating exclusively to the liability of nonappealing defendants, and the judge's charge *in extenso,* to which no exception was taken, and there being a large part of it pertaining only to the liability of nonprevailing appellants, taxation of the expense of printing such case is limited to about one third thereof. *Moore v. Dickson,* 591

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BILLS AND NOTES. See EXECUTORS, 2, 3. MORTGAGES, 3.

BOARD OF EDUCATION. See SCHOOLS.

BOARD OF REVIEW. See PENALTIES. TAXATION.

BONA FIDE PURCHASER. See POWERS. VENDOR AND PURCHASER, 1.

BONDS. See APPEAL, 3–7.

BRIDGES over streets. See MUNICIPAL CORPORATIONS, 13.

BRIEFS. See APPEAL, 13.

BUILDING CONTRACTS. See CONTRACTS, 6–9. LIENS.

CARRIERS. See STREET RAILWAYS, 2, 3.

CAUSE OF ACTION. See ACTION.

CIRCUIT COURTS. See COURTS, 9.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIMS.
Against city: Appeal. See MUNICIPAL CORPORATIONS, 37.
Against decedents. See DESCENT, 5.
Against insolvents. See CORPORATIONS, 17. CREDITORS' ACTION, 6–8.

CLASS LEGISLATION. See CONSTITUTIONAL LAW, 2.

CLERK OF COURT: Omissions: Effect. See DESCENT, 3.

CODE SYSTEM of pleading, etc. See CREDITORS' ACTION, 1. PLEADING, 1.

CO-EMPLOYEES. See MASTER AND SERVANT, 3.

COLLATERAL ATTACK. See COURTS, 4, 5. INSOLVENCY, 1.

COLLUSION. See CORPORATIONS, 8, 9. PLEADING, 3. RECEIVERS, 2–4. TRUSTS, 4, 5.

CONDITIONS PRECEDENT. See CONTRACTS, 3, 6, 7. EVIDENCE, 3. MALICIOUS PROSECUTION, 1. SALES, 5.

CONSIDERATION. See MORTGAGES, 2. VENDOR AND PURCHASER, 2.

CONSOLIDATION of actions. See ACTION, 2, 3.

CONSTITUTIONAL LAW.

Right "to obtain justice freely": Security for costs: Class legislation.

1. Reasonable regulations imposing costs and requiring security for costs as incidents of judicial proceedings to redress wrongs or protect rights, do not violate the bill of rights entitling every person to "obtain justice freely and without being obliged to purchase it." *Harrigan v. Gilchrist* (5) 130, 214
2. Statutory regulations of the right to a review upon appeal or otherwise, as regards costs and security for costs, cannot be condemned as class legislation merely because it is more burdensome for some persons than for others to comply therewith. *Id.* (7) 131, 220

Vested rights. See PENSIONS, 1, 2.

Trial by jury. See JURY.

Police power. See DRAINS, 2–4.

Eminent domain. See DRAINS, 4, 5.

Penalties: Officers subject to. See PENALTIES, 1.

Courts: Jurisdiction, etc. See COURTS, 9. JUSTICES' COURTS, 1, 2.

Cities: Classification: Amendment of charters. See MUNICIPAL CORPORATIONS, 1-6.

CONSTRUCTIVE TRUSTEES. See CORPORATIONS, 8, 9. TRUSTS, 4, 5, 9.
CONTEMPT. See RECEIVERS, 20.

CONTRACTS.

See DEEDS. MORTGAGES. MUNICIPAL CORPORATIONS, 9, 10. PARTNERSHIP. RECEIVERS, 13-15, 33. SALES. SCHOOLS. VENDOR AND PURCHASER.

When contractual rights arise. See PENSIONS, 1, 2.

Validity: Contracts of boards. See SCHOOLS, 1, 3.

Statute of frauds: Assumption of mortgage. See VENDOR AND PURCHASER, 3. 4.

When become binding. See EVIDENCE, 3. SALES.

Same: Delivery. See DEEDS, 1-4.

Upon whom binding. See EXECUTORS, 1-3.

Merger of oral agreement in deed. See VENDOR AND PURCHASER, 2.

Parol evidence affecting writings. See EVIDENCE, 3. VENDOR AND PURCHASER, 2.

Execution induced by fraud: Negligence: Evidence: Relief.

1. If false statements of fact, made by one party in negotiations leading to the execution of a contract, were of such a character as reasonably to excuse the other party from reading the contract and he was thereby induced to execute it, which he would not have done had he known its contents, such contract is not binding upon him unless he subsequently ratifies it with knowledge of the facts or in some other way precludes himself from rescinding it. *Standard Mfg. Co. v. Slot,* 14
2. In an action upon a contract of sale which defendant claimed he had been induced to sign, without reading it, by the false representations of plaintiff's agent that it was a commission agreement, it is immaterial whether such representations were made with fraudulent intent or not; and the admission of evidence of similar transactions between the agent and other persons, in no way involved in the litigation, offered for the purpose of showing such intent, was prejudicial error. *Ibid.*
3. In such action plaintiff should have been allowed to ask defendant, on cross-examination, whether he had ever thought of the subject of consignment or of the word "commission" before the action was brought. *Ibid.*
4. To entitle a party to relief from a contract on the ground of fraud, he must establish the fraud by a preponderance of the evidence, which also must be clear and satisfactory. *Ibid.*
5. One who, when he signed a contract was inexcusably ignorant of its contents, is not entitled to relief from its obligations on the ground that the other party induced him to sign by false representations as to such contents. *Ibid.*

Construction: Writings construed together. See EXECUTORS, 1-3.

Same: Entire or apportionable contracts. See SALES, 5.

Same: Building contract: "Extras": Liquidated damages.

6. A stipulation in a building contract to the effect that, unless the value of additions to or deductions from the contract work

shall first have been agreed upon and indorsed upon the contract, the difference in value, whether in favor of the contractor or of the owner, shall be deemed forfeited, should not be held to have been waived—at least in respect to trifling changes—by the mere failure to agree upon and indorse their value. It should be held waived in such case only upon clear and satisfactory evidence showing that to have been the intention of the parties or showing an estoppel *in pais*. *Davis v. La Crosse Hospital Asso.* 579

7. A contract provided in effect that no additional time should be allowed for the completion of the building on account of delays arising from certain specified causes unless at the time of such delay written notice should be given to the architect and he should then make the allowance. *Held*, that where no notice of claim for additional time was made under that provision, the architect had no right to consider such delays in determining whether or not the work could reasonably have been completed at the stipulated time. *Ibid.*

8. A contract for the building of a hospital for $24,660 provided that the contractor should pay $20 for each day the work remained uncompleted after a time fixed. The character of the building being such that the actual damages resulting from such a delay, or the rental value of the building, would be very difficult of ascertainment, and the amount stipulated not being largely, if at all, in excess of a fair interest on the investment, it is *held* that the provision was one for liquidated damages and not for a penalty. *Ibid.*

9. The delay for which, in such a case, the stipulated sum per day is payable refers to working days only. *Ibid.*

Same: Liens: Waiver. See LIENS.

Unfinished contracts: When pass on sale. See SALES, 4.

Same: Completion by receiver. See RECEIVERS, 13–15.

Delaying performance: Damages.

10. A contract for the drilling of a well by plaintiff for defendant provided that defendant should furnish the casing pipe and material for the pump; that plaintiff should put everything in place ready for pumping and assist in connecting the pump; and that the work should be pushed to completion with all possible dispatch and without unnecessary delay. Defendant failed to furnish the pipe and material for the pump for several weeks after plaintiff was ready to put them in the well, thereby delaying plaintiff in the performance of his contract. *Held*, that for such delay plaintiff might recover substantial damages. *Olson v. Viroqua*, 571

CONTRIBUTORY NEGLIGENCE. See MUNICIPAL CORPORATIONS, 22, 24, 25, 30, 31, 36. NEGLIGENCE, 3, 4. RAILROADS, 3. STREET RAILWAYS.

CONVEYANCES. See DEEDS. EXECUTORS. POWERS. SALES, 4. VENDOR AND PURCHASER.

CORPORATIONS.

Insolvency: Winding-up action: Parties: Receivers. See APPEAL, 2. CREDITORS' ACTION. RECEIVERS.

1. The practice of administering the affairs of an insolvent corporation for the benefit of creditors by proceedings in a general creditors' suit, does not depend upon the statute. So far as the

statutes go they are confirmatory or in aid of the law as it was formerly understood. *Harrigan v. Gilchrist* (28) 134, 244–246

2. Authorities to the effect that a court has no inherent power to dissolve a corporation, have no application to the question of whether it has power to lay hold of and administer the property of an insolvent corporation for the benefit of creditors. The two matters are distinct. The statute provides a right of action for the former, but only regulations and aids as regards the latter. *Id.* (41) 135, 268

3. The fact that the legal title to the trust fund in an administration suit is not in the creditors prosecuting the winding-up action, does not affect their right to an equitable remedy by action against the constructive trustee holders of the funds to be recovered and gathered into the hands of the agent of the court as their regular trustee. *Id.* (43) 136, 269

4. It is proper in a winding-up action to commence the same in a simple form, according as the necessities of the particular situation may require, and thereafter, with or without leave of the court, according to circumstances, broaden the same out by amended or supplemental complaint so as to bring before the court all parties and all matters proper or necessary to be so circumstanced in order that the entire subject matter, using the term in its broad sense, may be fully dealt with. *Id.* (47) 136, 274

5. The complications of an action to enforce all liabilities to which creditors of an insolvent corporation may, as a class, properly resort for the satisfaction of their claims, furnishes no justification for so limiting the character thereof as to eliminate therefrom any feature belonging thereto according to the broad principles that have been judicially determined to govern the subject. Those principles, not the difficulties in applying them, mark the boundaries of the subject matter that may be brought into an administration suit. *Id.* (57) 138, 295–300

6. In an action to administer the property of an insolvent corporation and enforce liabilities germane thereto as a trust fund for the payment of its debts, all persons possessing any part of such fund in a trust capacity, in any legitimate sense, and all persons contingently liable or liable only upon principles of equity, for the benefit of creditors as a class, are proper defendants. *Id.* (22) 133, 237–240, 249

7. A receiver of an insolvent corporation in a creditors' action to administer its affairs for their benefit, is a trustee of corporate assets in the right of the corporation for such creditors, and for the latter in their right as to all liabilities to which they may properly resort as a class, not enforcible by the corporation. *Id.* (23) 133, 237

8. The last foregoing rule includes persons who may have obtained property of the corporation in fraud of its creditors. They are constructive trustees for creditors, and their liabilities as such may properly be directly established in the creditors' suit. *Id.* (24) 133, 237–240

9. In an administrative action for the benefit of creditors, if a defendant is charged as trustee of property belonging to the trust fund on the ground of fraud, and the fraud fails yet the proof shows that such person has property which belongs to the trust, the appropriate relief in that regard may be granted. *Id.* (72) 140, 339, 442

10. A receiver or other officer of the court is not a trustee and proper to be made defendant as such, within the meaning of that term as used in sec. 3237, Stats. 1898. *Id.* (38) 135, 266

11. The fact that in a winding-up action creditors cannot act in the right of the receiver, does not militate against liabilities being enforced against parties as defendants in the creditors' action, the legal title to which is in the receiver. The creditors and the receiver have their respective spheres of action. That of the former appertains to the establishment of the trust to its fullest extent, and the enforcement thereof and of the liabilities created by law enforcible upon equitable principles so far as necessary to satisfy the claims of creditors, the effects in money to be covered into the trust fund in the possession of the receiver,—whose sphere of action is wholly administrative in character. *Id.* (29) 134, 247, 248

12. *Clarke v. Banner & V. P. Co.* 50 Wis. 416, so far as it holds that a person to whom it is claimed property of an insolvent has been transferred in fraud of creditors can be made a defendant in an administrative suit as to such insolvent only for purposes of discovery,—*held* to have been overruled shortly after it was made and never to have been followed. *Id.* (39) 135, 267

13. Sec. 3228, Stats. 1898, which led to the decision before mentioned, provides a rule of evidence to the end that a party, guilty of participating in the commission of fraud upon creditors of insolvent corporations or fraud for which they may properly call him to account, may be a defendant in a winding-up action, and when called to testify as to his conduct, be incapable of shielding himself from making full disclosure by pleading the ordinary privilege of a witness as to self-incriminating matters. *Id.* (40) 135, 267

14. A creditor's expenses, incurred by instituting and prosecuting, prudently and to effect, a suit on behalf of himself and all other creditors of an insolvent corporation, to have its property sequestered and judicially administered for their benefit, may properly be allowed as expenses of such administration. *Id.* (92) 143, 390

15. The statute furnishes no form, strictly so called, for a judgment in an action to administer the property of an insolvent corporation for the benefit of creditors, nor for any other. Sec. 3217, Stats. 1898, relates merely to a form of an order of distribution proper to be made in an action or special proceeding. The form of the judgment in all actions of an equitable nature, is governed by established principles of equity jurisprudence, and as indicated in sec. 2883, Stats. 1898. The judgment provided for in sec. 3245, Id., is for the closing up of an action to dissolve a corporation, not one merely to administer its assets for the benefit of creditors. *Id.* (50) 137, 278

16. The interests of creditors of an insolvent corporation having hypothecations consisting of bills receivable or other choses in action, made by it to secure them,—in property in the hands of a court receiver for the benefit of creditors generally, are not adverse to those of the receiver or such general creditors, there being no question as to the validity of such hypothecations. *Id.* (93) 143, 393

17. In the circumstances above suggested, legal services rendered the secured creditors as regards enforcing their collateral

against the collateral debtors or making formal proof of the principal creditor's claim for filing with the court in the receivership matter, are not inconsistent with the performance of legal services at the same time for the receiver. *Id.* (94) 143, 393

Same: Sequestration.

18. The statutory remedy by sequestration is not a right of action, new or old. It is at most a mere remedy of a provisional character, for use in an action which exists, except as regards mere form, independently of the statute, such remedy being merely in aid thereof. It is a substitute for the common-law writ of sequestration. *Harrigan v. Gilchrist* (26) 133, 243

19. Generally speaking, courts of equity will not, without legislative policy favorable thereto, manifested in some way, render a corporation incapable of performing its corporate duties and practically terminate its existence by sequestering its property and taking charge of its affairs, though it is within judicial power to do so if necessary to the ends of justice. *Id.* (27) 133, 243

Dissolution. See CORPORATIONS, 2, 15, 19.

COSTS.

See APPEAL, 21, 22. CONSTITUTIONAL LAW. RECEIVERS, 28.

1. The right to recover costs in an action or other judicial proceeding depends upon the statute. *State ex rel. Risch v. Trustees,* 44

2. Though not commenced by the service of a summons as provided in sec. 2629, Stats. 1898, a *mandamus* proceeding (commenced by service of the writ) is a "civil action" within the meaning of sec. 2595, and an "action" within the meaning of secs. 2918, 2920, relating to costs. *Ibid.*

3. In an action to foreclose a mortgage given by an administrator, where judgment was demanded against him personally for any deficiency, costs were properly awarded to him in a judgment determining that he was not personally liable and granting his counterclaim for reformation of the instrument, accordingly. *Wis. Trust Co. v. Chapman,* 479

4. A judgment against a number of partners was appealed from by a part of them and was reversed. Upon a second trial a new judgment was entered against all the defendants, and the costs allowed included those taxed and allowed in the former judgment. Some of the former appellants again appealed. *Held,* that as to them, at least, the inclusion of such costs was not error. *Moore v. Dickson,* 591

COUNTERCLAIM. See COSTS, 3.

COUNTY COURT. See GUARDIAN AND WARD.

COURTS.

See JUDGES.

Jurisdiction in general.

1. A challenge to the jurisdiction of the court of the subject matter of the litigation in any action is proper at any time in the progress thereof. Whether counsel raise the question or waive it, or expressly consent to the jurisdiction, does not change the situation. *Harrigan v. Gilchrist* (11) 132, 224

2. If the defect of jurisdiction springs from want of power the result is void; if from inexcusable departure from established principles governing the exercise of judicial power, it is erroneous and may and ought to be set aside upon appeal regardless of the attitude of counsel in respect thereto upon either side. *Id.* (12) 132, 227, 228

3. A court may be without judicial power as to a particular subject matter, or have such power, but by settled principle ought not to exercise it at all or in the particular way. In either case, within the broad meaning of the term, the court is without jurisdiction of the subject matter. *Id.* (14) 132, 227

4. Want of judicial power as to a particular subject of action renders relief granted to the plaintiff open to challenge, directly or indirectly, as void. Abuse of power in the sense of inexcusable departure from established principles in the exercise of judicial authority, leaves the result binding upon the parties interested till set aside in some appropriate judicial proceeding. *Id.* (15) 132, 228

5. Judicial action beyond the limits of judicial power is usurpation. Judicial action within the limits of such power, but regardless of settled principles regulating the exercise of such power, is regarded as error of judgment, but may be jurisdictional error, nevertheless, though remediable only as before stated. *Id.* (16) 132, 228

6. Whenever there is such a violation of established practice or principles in regard to the exercise of judicial authority as to seriously interfere with the efficiency of judicial instrumentalities to administer justice, the error is jurisdictional. *Id.* (18) 132, 231

7. Under the Code, whether a plaintiff plants his cause of action at law or in equity from the aspect of common-law procedure, does not, if improperly planted, raise a jurisdictional question in the strict sense of the term; only a question of practice. *Id.* (17) 132, 231

Same: Defendants decoyed into state.

8. Where plaintiff by fraud decoyed the defendants into this state for the purpose of bringing them within the jurisdiction of its courts, the action may, in discretion, be dismissed on that ground; and it is immaterial that plaintiff intended at first merely a criminal prosecution and not a civil action, or that, after service of process in the civil action, defendants entered appearances therein or otherwise submitted to the jurisdiction. *Saveland v. Connors,* 28

Supreme court: Jurisdiction and practice. See APPEAL AND ERROR.

Circuit courts.

9. The constitutional jurisdiction of the circuit courts of this state is substantially coextensive with that of the English courts of King's Bench, Common Pleas, and Chancery combined. *Harrigan v. Gilchrist* (13) 132, 227

County courts. See GUARDIAN AND WARD.

Justices' courts. See JUSTICES' COURTS.

Presumption of regularity of proceedings.

10. The presumption in favor of the regularity of the proceedings of a court of general jurisdiction obtains in case of a proceeding under a special statute. *In re Marchant's Estate,* 526

Mistakes or omissions of officers. See DESCENT, 3.

Federal and state courts: Comity.

11. A state court should not proceed in an action when it appears that a prior action between the same parties and involving the same issues is pending in a federal court. *Ashland v. Wis. Cent. R. Co.* 646

CREDITORS' ACTION.

See CORPORATIONS. RECEIVERS.

1. A creditors' action is commenced by a complaint in the nature of a bill in equity. Such complaint is the substitute for, and in all respects performs the office of, the creditors' bill of the old practice. The Code system substitutes the civil action and its appropriate procedure for the former suit in equity or action at law. It only provides a new form of action, leaving the general characteristics of the remedy otherwise the same as before. It is the forms of action, not the substance thereof, as regards the essential of the remedy, that were abolished by the Code. *Harrigan v. Gilchrist* (45) 136, 273

2. New matters which, had they been known or had they existed at the commencement of an action, might properly have been incorporated in the complaint, may be brought in by amended or supplemental complaint. Such was the old practice, and it is preserved by sec. 2687 of the Code. *Id.* (46) 136, 274

3. Mere delay in moving for leave to bring in a supplemental complaint does not preclude the court from granting a motion to that end. *Id.* (63) 139, 308

4. In a creditors' action the rendition of a judgment at law, the issuance of an execution thereon, and the return thereof unsatisfied, should be alleged in the complaint, and a defect in that regard may be taken advantage of by demurrer *ore tenus.* *Id.* (61) 139, 306

5. In a creditors' suit, a sufficient cause of action having been stated in the complaint, a change of parties thereafter, so that no one under the rule last stated, competent at the start to invoke the jurisdiction of the court, appears as plaintiff, or a party to the action, the facts still appearing essential to the cause of action in the beginning, is immaterial. *Id.* (62) 139, 307

6. A creditor of an insolvent whose estate is in process of administration under judicial supervision, having a secured claim against such insolvent, may prove it to the full amount, and in such case he is entitled to share with general creditors upon that basis in every general distribution of trust funds till the dividends, together with the receipts, if any, from the security, are sufficient to fully pay such claim, the residue of the security remaining to belong to the trust fund or to the owner of the equity. *Id.* (75) 140, 344

7. The foregoing is the chancery rule. The rule limiting the claimant, in the circumstances stated, to share with general creditors only on the basis of his claim less the value of his security, unless he surrenders the latter, is wholly statutory and generally confined to administrations under bankruptcy laws. *Id.* (76) 140, 344, 345

8. The rule that where there are two funds, one person having security on both and another on one of them, equity will compel the former to first exhaust the security in which his interest is exclusive, is not to be applied to his prejudice. *Id.* (77) 141, 345, 346

CRIMINAL LAW. See JUSTICES' COURTS, 1–4.

CROSS-EXAMINATION. See CONTRACTS, 3. EVIDENCE, 1.

CUSTOMARY USE of street, causing injury. See MUNICIPAL CORPORATIONS, 17.

DAMAGES.

See CONTRACTS, 8–10. MALICIOUS PROSECUTION, 2, 3. TRUSTS, 7.

1. For the total loss of one eye and impairment of the other and injury to bones of the face, forehead, and skull, leaving an unevenness of surface, necessitating removal of a part of the bone covering the brain, and causing continued pain and discomfort, an award of $8,500 is *held* not excessive. *Wysocki v. Wis. Lakes I. & C. Co.* 96

2. Upon evidence tending to prove that as a result of a fall on a defective sidewalk plaintiff received severe external bruises, suffered much pain, was confined to her bed for six weeks, and was disabled from comfortable performance of her household duties for a long time, and also suffered some injury to organs in the pelvic region, it was not an abuse of discretion to refuse to set aside as excessive a verdict for $1,000. *Duncan v. Grand Rapids,* 626

DEATH caused by negligence. See MUNICIPAL CORPORATIONS, 14, 15.

DEBTOR AND CREDITOR. See CORPORATIONS. CREDITORS' ACTION. INSOLVENCY. INTEREST. LIENS. MORTGAGES. RECEIVERS.

DEEDS.

See EXECUTORS. POWERS. SALES, 4. VENDOR AND PURCHASER, 2–6.

1. Where a person, in expectation of death, executes a conveyance and places it in the hands of a depositary for delivery after his death, but reserves the right to reclaim the instrument in case he gets well, there is no delivery, and the agency of the depositary to make delivery terminates with the grantor's death. *Ward v. Russell,* 77

2. The manual deposit of a deed with a third person, to receive and hold for the grantee, with intent thereby to give the paper effect as a deed and to place the same beyond the custody and control of the grantor, will give such deed validity and efficacy as against the grantor, although some condition is imposed, precedent to final delivery to the grantee, which may serve to prevent vesting of actual title in him meanwhile. *Kittoe v. Willey,* 548

3. Though the intent to make effective delivery is less readily inferred when a bedridden man hands to his wife a deed to another person, yet, if the necessary intent to place the instrument out of his control for the benefit of the grantee exists, the deposit with the wife is as effective as with a stranger. *Ibid.*

4. The question of the intent of the grantor in delivering a deed to another than the grantee is one of fact, to be determined from all the circumstances surrounding the transaction. *Ibid.*

5. A finding of the trial court that a conveyance of land was not executed as the result of undue influence, is *held* not against the clear preponderance of the evidence. *Kraniger v. Schmidt*, 82

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See CONTRACTS, 7-10. CREDITORS' ACTION, 3.

DELIVERY. See DEEDS, 1-4.

DEMURRER. See PLEADING, 2, 5.

DEPOSIT of deed for delivery. See DEEDS, 1-4.

DESCENT AND DISTRIBUTION.

Establishment of heirship: Jurisdiction: Presumptions: Waiver of rights.

1. Notice was duly given that an application, under ch. 49, R. S. 1858, to establish heirship would be made to the circuit court on April 3, or as soon thereafter as counsel could be heard. The records of the court do not show that any proceeding was had in the matter on April 3, but show that the application was heard on May 17, at a sitting of the court during the term which commenced on April 3. The notice, with proof of publication, the required consent dated April 3, and the proper petition dated April 28, were filed on May 17, and the fact that the application was based on such papers, and their filing, are recited in the order dated May 17, establishing the heirship. *Held* that, the court having jurisdiction of the parties and the subject matter, it will be presumed that due proceedings were had at the time set by the notice, preparatory to the making of the order of May 17th. *In re Marchant's Estate*, 526
2. A statute providing for the establishment of heirships should be construed liberally to accomplish its object. *Ibid.*
3. Failure of the court officers to enter at length upon the records, as required by the statute, an order establishing heirship, does not invalidate the order. *Ibid.*
4. The county court may properly proceed to determine who are the heirs of a decedent, although the administration of his estate has not reached the stage of final distribution. *Ibid.*
5. One whose rights as the established heir of a decedent under an order of court were disputed did not waive such rights by filing a claim for services rendered to the decedent, such claim being filed to protect him in case it should be determined that he had no interest in the estate as heir. *Ibid.*

Advancements.

6. Under sec. 3959, Stats. 1898, a delivery of property by one person to another having claims upon his bounty is not to be deemed an advancement unless, at the time of such delivery, it is given that character either by a declaration in the writing making the bestowal, or by an acknowledgment in writing by the recipient, or by an expression of the donor in respect to the matter in charging the property to the donee. *Ludington v. Patton*, 649
7. Thus, sums of money furnished by a testator to his children in his lifetime and charged to them upon his books in the form of loans should not be treated as advancements but as a part of the estate in which the widow, who had elected not to take under the will, was entitled to share equally with the children,

although the will provided that "all sums advanced and charged by me to either of my children . . . are to be deemed advancements to said child and to be taken into account" in the distribution of the estate. *Ibid.*

DISCOVERY. See CORPORATIONS, 12.

DISCRETION. See APPEAL, 17. COURTS, 8. JUDGES, 2. RECEIVERS, 19, 20, 23, 25, 26. VERDICT, 1.

DISSOLUTION of corporation. See CORPORATIONS, 2, 15, 19.

DITCHES. See DRAINS.

DOWER. See EXECUTORS, 5.

DRAINS.

1. An application to the *supervisors* of a town, under sec. 1359, Stats. 1898, for the laying out of a ditch or drain is not an application to the *town board* within the meaning of sec. 3187*a*, and the filing of a notice of the pendency of the application is therefore not essential. *Rude v. St. Marie*, 634

2. The construction of ditches or drains under ch. 54, Stats. 1898, is not for merely private uses, but, in the exercise of the police power of the state, to promote the public health and welfare. Certain remarks in *Donnelly v. Decker*, 58 Wis. 461, criticised. *Ibid.*

3. The state has power to abate a public nuisance by compelling the drainage of lands which might otherwise create malaria or other diseases; and special assessments therefor, founded on the special benefits conferred, do not constitute a taking of private property for public use without just compensation. *Ibid.*

4. The fact that there may be a special assessment of benefits against the owner of land on which a drain is constructed does not take the proceeding out from under the police power and place it under the power of eminent domain. *Ibid.*

5. Even if a proceeding under ch. 54, Stats. 1898, results in the taking of one person's land under the power of eminent domain as a means of abating a nuisance on the lands of another, the statute protects all constitutional rights, since it provides for due compensation. *Ibid.*

DUPLICITY in question. See MUNICIPAL CORPORATIONS, 28. VERDICT, 2.

ELECTRIC WIRES in street. See MUNICIPAL CORPORATIONS, 14, 15.

ELEVATORS: Open door: Injury to hotel guest. See NEGLIGENCE, 4.

EMINENT DOMAIN. See DRAINS, 4, 5.

ENTIRE CONTRACT. See SALES, 5.

EQUITY.

See ABATEMENT. ACTION, 1. CORPORATIONS. CREDITORS' ACTION. INJUNCTION. MORTGAGES. RECEIVERS. TRADENAMES. TRUSTS.

1. The jurisdiction of courts of equity is defined by principles, not by precedents; the former govern, the latter illustrate. *Harrigan v. Gilchrist* (19) 133, 234

2. New principles of equity are not to be added by judicial policy, but old ones are subject to development to meet new conditions. *Id.* (20) 133, 235

3. The relief within the power of equity jurisdiction to afford where legal remedies are inadequate or do not exist at all, is limited only by the wrongs to be redressed or the rights to be protected; this not extending, however, to mere violations of moral obligations. *Id.* (21) 133, 235

4. One of the most valuable features of equity jurisprudence is the opportunity thereby afforded to judicially lay hold of a subject matter, however large, and however complicated by numerous matters that might under some circumstances constitute each by itself a separate ground of action, bring in all parties directly interested or who should be before the court for their due protection, however numerous, and forever settle the entire controversy, with all its incidental disputes, its major and minor equities. *Id.* (58) 138, 299

5. Within the broad principles last above cited, no jurisdictional error can be committed so long as there is no unjustifiable prejudicial departure from established practice. *Id.* (59) 138, 300, 301

6. The whole subject of enforcing trusts and administering the same is within the exclusive jurisdiction of equity in the absence of any statutory regulation on the subject. *Id.* (25) 133, 241

ESTATES in land. See POWERS.

ESTATES OF DECEDENTS. See DESCENT AND DISTRIBUTION. EXECUTORS. POWERS.

ESTOPPEL. See CONTRACTS, 6. EXECUTORS, 4.

EVIDENCE.

Presumptions. See COURTS, 10.

Burden of proof: Degree. See APPEAL, 14b. CONTRACTS, 4.

Relevancy, materiality, and competency. See CONTRACTS, 2. MUNICIPAL CORPORATIONS, 19, 20, 27, 34, 35.

1. In an action to recover damages for fraud perpetrated in connection with a prize fight, defendants cannot properly be questioned, on cross-examination, as to their knowledge of, or connection with, other fraudulent sporting events. *Saveland v. Connors,* 28

Best evidence. See SCHOOLS, 2.

Admissions. See PRINCIPAL AND AGENT.

Orders and recitals as evidence. See APPEAL, 15. INSOLVENCY, 4, 5.

Weight and sufficiency. See RECEIVERS, 10. STREET RAILWAYS, 2.

2. The undisputed reasonable evidence of one witness, though a party interested, should control as to a question of fact. *Harrigan v. Gilchrist* (90) 143, 383

Parol evidence affecting writings. See VENDOR AND PURCHASER, 2.

3. Parol evidence is admissible to show that a writing signed and delivered was not to become binding as a contract until the happening of some event or the ascertainment of some fact. Thus, it may be shown by parol that the transfer, by indorsement and delivery, of a certificate of membership in a chamber of commerce was not to take effect in case an agent of the vendor had already disposed of the membership. *State ex rel. Jones v. Chamber of Commerce,* 110

Expert testimony: Physicians and surgeons.

4. In an action for personal injuries evidence as to statements of the plaintiff to his physician is admissible only when they were made for the sole purpose of obtaining treatment before litigation was begun or threatened. *Kath v. Wis. Cent. R. Co.* 503
5. An expert medical witness cannot state what he has learned entirely from medical works, unsupported by practical experience of his own; but on motion to strike out testimony it should be affirmatively shown to be within such rule of exclusion. *Ibid.*
6. Opinion evidence should not be permitted to extend to the merits of the controversy, passing upon questions to be submitted to the jury, or to go outside the field of scientific knowledge. *Lyon v. Grand Rapids,* 609
7. In an action for personal injuries alleged to have been caused by a defective sidewalk, a medical expert was asked what, in his opinion, was the cause of the particular diseased condition of plaintiff to which he had testified, basing such opinion on the assumption that her testimony was true and upon his observation and examination of her. *Held,* that a general objection to the question as incompetent did not reach the defect, if there was one, that the question was not sufficiently restricted to prevent the witness from going outside the field of scientific knowledge; and, no motion having been made to strike out the answer that plaintiff's diseased condition was caused by her fall on the sidewalk, there was no error of which defendant can complain. *Ibid.*

Photographs: Testimony as to correctness.

8. A witness familiar with a certain locality may state whether a photograph is a substantially correct representation of that place as it existed at the time of an accident, though he was not present when the photograph was taken. *Hebbe v. Maple Creek,* 668

Leading questions. See MUNICIPAL CORPORATIONS, 26. WITNESSES, 1.

Review in supreme court: Questions of fact: Immaterial errors. See APPEAL, 14, 15, 17.

Examination of witnesses. See WITNESSES.

EXCESSIVE DAMAGES. See DAMAGES.

EXECUTORS AND ADMINISTRATORS.

See ABATEMENT. COSTS, 2. DESCENT AND DISTRIBUTION.

1. A transfer of real estate by an administrator, under the power and direction of the court, should be viewed in the light of his relation to the property and the objects to be accomplished, and the words of the transfer should be given an interpretation limited to the occasion. *Wis. Trust Co. v. Chapman,* 479
2. Promissory notes and an accompanying mortgage of lands of a decedent, executed by an administrator under the direction of the court as security for a loan obtained in order to pay claims against the decedent, should be construed together. *Ibid.*
3. Such instruments in this case are *held* to show on their face that they were executed by the administrator in his representative capacity under authority from the court, so that neither the

original mortgagee nor *bona fide* purchasers obtained any right to enforce payment against the administrator personally. *Ibid.*

4. An heir who appeared in the proceeding wherein the administrator was authorized to mortgage real estate, and afterwards assented to the settlement of the final account and discharge of the administrator and to the partition of the estate which gave her the mortgaged lands subject to the mortgage, is estopped to question, in an action to foreclose the mortgage, the regularity of the proceeding by which the mortgage was authorized. *Ibid.*

5. A mandate of this court having directed that a widow be restored to the situation she would have occupied had she duly elected to take the provision made for her by law instead of that made in her husband's will, and had she seasonably been put in possession and enjoyment thereof—full directions are given, on a second appeal, as to carrying out such mandate by the executors as trustees under the will, in respect to the method of stating the account, the insurance with which the widow should be charged, the assignment of her dower, her interest in a certain mortgage, and the interest to be charged on payments made to her and to the heirs. *Ludington v. Patton,* 649

EX PARTE ORDERS. See RECEIVERS, 16, 17.

EXPERT TESTIMONY. See EVIDENCE, 4–8.

FALSE REPRESENTATIONS. See CONTRACTS, 1–5.

FEDERAL AND STATE COURTS. See COURTS, 11.

FELLOW SERVANTS. See MASTER AND SERVANT, 3.

FENCES. See INJUNCTION.

FINDINGS OF FACT. See APPEAL, 14, 16. REPLEVIN. TRIAL, 6.

FORFEITURES. See PENALTIES. PLEADING, 4.

FORMS for pleadings, judgment, etc. See CORPORATIONS, 15. CREDITORS' ACTION, 1. PLEADING, 1.

FRAUD. See APPEAL, 14, 15. CONTRACTS, 1–5. CORPORATIONS, 8, 9, 12, 13. COURTS, 8. EVIDENCE, 1. JUDGES, 2. PLEADING, 3, 6. RECEIVERS, 2–4, 11. TRUSTS, 4, 5, 9.

FRAUDS, STATUTE OF. See VENDOR AND PURCHASER, 3, 4.

GUARDIAN AND WARD.

1. A petition for the appointment of a guardian for an incompetent person is not insufficient to give the county court jurisdiction to proceed in the matter merely because it fails to state the names of the persons who would be affected by such appointment, and fails to show with whom the alleged incompetent resides and who is in possession of her property. *Ziegler v. Bark,* 533

2. Where notice of the time and place for hearing such petition was given to the alleged incompetent by personal service and to all other persons by publication in compliance with the statute and the order of the court, it was not essential to the jurisdiction that personal service should have been ordered or made upon the son with whom she resided and who had control of her property, or upon her other children. *Ibid.*

3. Where the alleged incompetent was personally present in court during the hearing, it is immaterial that the order for such hearing did not require that, if able to attend, she be produced before the court. *Ibid.*

4. On the hearing of a petition for the appointment of a guardian for an alleged incompetent person, the county court appointed a guardian *ad litem* for her, and, she having been adjudged incompetent and a guardian appointed, the guardian *ad litem* appealed on her behalf to the circuit court. *Held*, that such appeal gave the circuit court jurisdiction. *Ibid.*

5. A son of the alleged incompetent person who had possession of all her property under an assignment or transfer from her, was a person aggrieved by the order and judgment of the county court appointing the guardian, and hence was entitled to appeal therefrom. *Ibid.*

6. Upon the appeal in such case the circuit court had no authority to adjudge the validity of the agreement between the alleged incompetent and her son, whereby her property was transferred to him and he agreed to provide for her support,—an action brought by her to set aside such agreement being then pending. *Ibid.*

GUARDIANS AD LITEM. See GUARDIAN AND WARD, 4.

HEIRSHIP: Establishment. See DESCENT, 1–5.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 11–36. VERDICT, 2.

1. A horse which, after shying at an electric car, ran sixty feet or more along the street in spite of the driver's efforts to stop him, is *held*, as matter of law, to have been more than "momentarily uncontrolled," within the meaning of that expression as used in the rules of law respecting liability of municipalities for injuries caused by defects in their highways. *Ehleiter v. Milwaukee*, 85

2. To entitle a traveler driving on a so-called side track of a highway to recover for injuries sustained by reason of a defect therein, it is not necessary that such track should have been "equally accessible" or have been "apparently as much traveled" as the main track. It is sufficient that it was reasonably accessible to travelers and appeared to have been recently traveled to a considerable extent as a part of the public highway. *Hebbe v. Maple Creek*, 668

3. A stone may constitute a defect in a highway, though it is not within the traveled track, if it is so near such track that the wheels of passing vehicles driven with ordinary care are likely to come in contact with it, and is dangerous to such vehicles and persons therein. *Ibid.*

HOMESTEAD. See EXECUTORS, 5.

HUSBAND AND WIFE. See DEEDS, 3.

HYPOTHECATIONS. See CORPORATIONS, 16, 17. RECEIVERS, 6–8, 12.

IMPEACHMENT. See WITNESSES, 2.

INCOMPETENT PERSONS. See GUARDIAN AND WARD.

INJUNCTION.

See MALICIOUS PROSECUTION. MUNICIPAL CORPORATIONS, 11. TRADE-NAMES.

A court of equity will not interfere to prevent a mere threatened trespass upon land; but where, by reason of the continuous or repeated character of the threatened invasion, many actions at law would be necessary, in no one of which could compensation for the whole wrong be obtained, an action for an injunction may be maintained. So *held*, on demurrer to a complaint alleging that defendant had built a fence on plaintiff's land, cutting him off from access to a street; that plaintiff had removed the fence; but that defendant threatens to re-enter and reconstruct the fence as often as plaintiff removes it. *Miller v. Hoeschler*, 558

INSOLVENCY.

See CORPORATIONS.

1. If lack of jurisdiction appears on the face of the record in insolvency proceedings, the discharge therein may be attacked collaterally. *German-American Bank v. Powell*, 575
2. Proceedings by an insolvent debtor under ch. 179, Stats. 1898, to obtain a discharge from his debts are strictly adversary, and creditors whose claims are to be barred thereby must be made parties and jurisdiction of them obtained in the manner provided by the statute. *Ibid.*
3. Under sec. 4285, Stats. 1898, the fixing of a day for the hearing, in the order to show cause why a discharge in insolvency should not be granted, is jurisdictional. *Ibid.*
4. Where, in the written order on file, the date fixed for the hearing is left blank, a recital in a subsequent order that the court did in fact fix a certain day as the time for the hearing sufficiently shows that the day was properly fixed. *Ibid.*
5. The written order on file is not necessarily the decision of the court, but generally is merely evidence thereof, the announcement from the bench being the order in fact. *Ibid.*
6. The provision of sec. 4288, Stats. 1898, that on the day fixed in the order to show cause proof shall be made of the service and publication of the required notices "before any other proceeding shall be had," is mandatory and exclusive, and a discharge granted before the filing of such proof is without jurisdiction and void. *Ibid.*

INSTRUCTIONS TO JURY. See MUNICIPAL CORPORATIONS, 19, 30, 31. STREET RAILWAYS, 3. TRIAL, 3–5.

INSURANCE chargeable to life tenant. See *Ludington v. Patton*, 649

INTENT. See CONTRACTS, 2. DEEDS, 1–4. PENALTIES, 2.

INTEREST.

See EXECUTORS, 5. RECEIVERS, 34.

Where there is no agreement to pay interest on a loan, and repayment is made on demand, the borrower is not liable for interest. *Ehrlich v. Brucker*, 495

JOINDER.
Of causes of action. See PLEADING, 2, 3.
Of parties. See CORPORATIONS, 6–13. CREDITORS' ACTION, 5.
JOINT LIABILITY. See TRUSTS, 5.

JUDGES.

1. A judge should not sit to review the mere exercise of judgment by his predecessor, but should leave the parties aggrieved to their remedy by appeal. *Harrigan v. Gilchrist* (107) 145, 428
2. Notwithstanding the foregoing general rule, if a judge is clearly satisfied that an order in an action still pending in his court was granted by his predecessor without the exercise of judgment, through mistake or some fraud perpetrated upon the court, or some indiscretion so manifest that the judge granting the same, if in a position to do so, would in all reasonable probability give relief therefrom, or if satisfied that had the adverse parties been heard the result would have been different, and that failure in that regard is attributable to excusable mistake or neglect,—he may set such order aside. *Id.* (108) 145, 429

JUDGMENT.

In winding-up action: Form, etc. See CORPORATIONS, 14, 15. PLEADING, 1.
Clerical errors. See REPLEVIN.
Vacating: Decision differing from announced opinion.
1. In the trial of an action, if the trial judge at the close of the evidence, as to a matter brought in by amendment on the trial entitling the adverse party to a continuance, announces an opinion as to the effect of such evidence respecting such new matter, having good ground to believe that such announcement will be relied upon by such adverse party, and such party does so rely, and thereafter a decision is rendered materially at variance with such opinion,—the case should be reopened as to such new matter upon seasonable application being made therefor with reasonable probability that upon a new hearing such adverse party can successfully meet such new matter and is guilty of no inexcusable laches. *Harrigan v. Gilchrist* (89) 142, 374, 375
Same: Recovery of moneys already paid.
2. Money paid on a judicial order or judgment subsequently set aside, may be recovered back in an action for money had and received, payment being presumed to have been made upon the implied understanding that restoration would take place under such circumstances. *Id.* (109) 145, 441
3. That rule does not apply to a person receiving money from another in the extinguishment of an indebtedness *inter partes*, which money shall have been previously adjudged to such other against a third person, upon the adjudication being vacated, so as to enable such third person to recover the same of the one receiving it. He can recover only of such other. *Id.* (110) 145, 440
Collateral attack. See INSOLVENCY, 1.
Reversal on appeal. See APPEAL, *Affirmance and reversal.*

Direction by appellate court: Entry in trial court. See APPEAL, 18–20.

JURISDICTION. See ACTION, 1. APPEAL, 5–10. COURTS. EQUITY. GUARDIAN AND WARD, 1–4. INSOLVENCY. JUSTICES' COURTS.

JURY.

Right to trial by jury.

1. The constitutional guaranty of the right of trial by jury refers only to such right as it was enjoyed before the constitution. It did not extend then, so it does not now, to actions of an equitable nature. *Harrigan v. Gilchrist* (52) 137, 281
2. A statutory action is not necessarily to be tried by jury. Whether it is or is not so triable is to be determined, in the absence of a statutory declaration on the subject, with reference to whether its general characteristics are those of an action at law or one in equity from the aspect of the old remedies. *Id.* (53) 137, 281

JUSTICES' COURTS.

Criminal jurisdiction in Milwaukee.

1. Sec. 5, ch. 6, Laws of 1895, divesting justices of the peace in the city of Milwaukee of jurisdiction in criminal cases, and vesting such jurisdiction in the police court of the city, applies to offenses committed outside of the city, but within the county, as well as to those committed in the city. *Heller v. Clarke,* 71
2. Such legislation does not contravene sec. 2, art. VII, Const. *Ibid.*

Acts beyond jurisdiction: Trespass.

3. When justices of the peace act in cases of which they have no jurisdiction their proceedings are void and they become trespassers, and as such are liable to any person injured by their acts. *Ibid.*
4. A warrant showing upon its face that the justice issuing it has no jurisdiction is no protection to an officer making an arrest thereon. *Ibid.*

Replevin: Affidavit: Misnomer.

5. An affidavit for replevin, naming "Charles Oleson" as plaintiff, is not insufficient because signed "Charley Olson," where there is no doubt, upon the record, that the person who subscribed the affidavit, as certified by the justice who issued the warrant, was the person whom such justice intended to name in the body of the affidavit. *Olson v. Peabody,* 675
6. That an affidavit for replevin stated defendant's first name as "Wimmiam," while in the warrant and in fact it was "William," is not fatal to the jurisdiction of the justice, where the defendant duly appeared in the action. *Ibid.*

Removal of cause: Affidavit: Parties.

7. An affidavit for the removal of a cause from a justice on the ground or prejudice, filed by one defendant for and on behalf of himself and the other defendants named in the title thereof, is sufficient for the removal, as against the affiant, whether such other defendants were parties to the action at the time or not. *Ibid.*

LEADING QUESTIONS. See MUNICIPAL CORPORATIONS, 26. WITNESSES, 1.

LIENS.

Of mechanics, etc.

1. The right to a mechanic's lien may be waived by an agreement not to exercise it; but if the contract is ambiguous on the question the doubt will be resolved against the waiver. *Davis v. La Crosse Hospital Asso.* 579
2. A contract providing for delivery of the completed building to the owner "free from all claims, liens, and charges," and for final payment when the architect should be satisfied that the building was in fact free from liens, is *held* to refer only to liens of those claiming through or under the contractor, and not to be a waiver of his own right to a lien. *Ibid.*

Of receivers. See RECEIVERS, 7.

LIFE ESTATES. See EXECUTORS, 5. POWERS.

LIMITATION OF ACTIONS. See MUNICIPAL CORPORATIONS, 37.

LIQUIDATED DAMAGES. See CONTRACTS, 8, 9.

LIS PENDENS. See DRAINS, 1.

MALICIOUS PROSECUTION.

1. An order that a defendant show cause on a certain day why he should not be restrained from disposing of his property *pendente lite*, and restraining him from disposing of it in the meanwhile, went down because the court was not in session on the day set, and was abandoned. *Held*, that such termination of that proceeding did not give said defendant a right to maintain an action for malicious prosecution before the termination of the action in which that proceeding was had. *Williams v. Ainsworth*, 600
2. In an action to recover damages for the malicious abuse of an injunctional proceeding to restrain the sale of property, it appeared that the property could have been sold at prices as high immediately after the termination of the proceeding as before it was in force, and there was no proof that the party restrained could or would have sold it during the time he was so restrained. *Held*, that the jury were properly directed that there could be no recovery. *Ibid.*
3. To warrant a recovery in such a case it must appear that the injunction prevented a sale. *Ibid.*

MANDAMUS. See APPEAL, 11. COSTS, 2. SCHOOLS, 4.

MASTER AND SERVANT.

Injuries to servants: Negligence. See RAILROADS.

1. In an action for injuries to a boy employed by an ice company, caused by the kick of a vicious horse which he had been directed by one G., another employee, to hitch to a cart for the purpose of hauling ice, the evidence is *held* to sustain a finding in the special verdict that G. had authority to represent the company in designating the particular horse to be used in the work. *Wysocki v. Wis. Lakes I. & C. Co.* 96
2. Upon the question whether G. had such authority, evidence that employees consulted him as to their duties and the repair of instruments was admissible. *Ibid.*

3. It being the duty of the company to furnish only reasonably safe horses to be used by its employees in its business, and it appearing that the horse in question was vicious and had a propensity to kick persons, that such propensity was known to G. before the accident, and that in respect to this matter G. was not a mere co-employee of plaintiff, but was a vice principal, charged with performance of the master's duty, the company is responsible for the consequences of G.'s want of ordinary care in that regard. *Ibid.*

MAXIMS.
Actio personalis moritur cum persona, 340.
Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam, 216.
Odiosa et inhonesta non sunt in lege præsumenda; et in facto quod se habet ad bonum et malum, magis de bono quam de malo præsumenda est, 313.
Victus victori in expensis condemnandus est, 219.
Vigilantibus et non dormientibus succurrunt jura, 26.

MECHANICS' LIENS. See LIENS.

MEDICAL BOOKS. See EVIDENCE, 5.

MISJOINDER of causes of action. See PLEADING, 2, 3.

MISNOMER. See JUSTICES' COURTS, 5, 6.

MISTAKE. See APPEAL, 5–9. JUDGES, 2. MUNICIPAL CORPORATIONS, 6. VENDOR AND PURCHASER, 2.

MONEY HAD AND RECEIVED. See JUDGMENT, 2, 3. PARTNERSHIP, 1. RECEIVERS, 33, 34.

MORTGAGES.

Imperfect mortgage: Equity: Priority.

1. An imperfect attempt to give a mortgage, or any act clearly showing an intention to pledge property as security for an indebtedness, or "any transaction, whatever be its form or whatever name the parties may choose to give it," sufficient being done to enable a court of equity to deal with the matter, is in equity a mortgage; and, there being no superior equities, is as forceful to hold the property for the interest of the mortgagee as any mortgage. *Harrigan v. Gilchrist* (82) 141, 359, 360

2. A mortgage of the kind above indicated takes precedence of subsequently acquired rights of creditors in a judicial administration of property of the mortgagor for the benefit of his creditors, and forms a good consideration and justification for the giving of a formal mortgage when, if the equitable right did not exist, a valid security could not be given because of the rights of creditors. *Id.* (83) 142, 362

Mortgage by administrator: Personal liability. See EXECUTORS, 1–4.

Mortgage as part of estate of decedent: Rights of widow. See EXECUTORS, 5.

Assumption of mortgage by purchaser. See VENDOR AND PURCHASER, 3–6.

Invalid assignment of notes: Judgment on foreclosure.

3. Notes secured by a mortgage were executed to a trust company, which afterwards assigned the notes to several persons. In an action by the company and such assignees they obtained judgment of foreclosure. *Held*, on appeal, that the objection

that the assignment of the notes was invalid because not properly stamped under the federal statutes is unavailing, since, even if such be the fact, the judgment should stand as properly awarded in favor of the trust company. *Wis. Trust Co. v. Chapman,* 479

Costs in favor of administrator held not personally liable. See COSTS, 3.

MOTIONS: *Ex parte* orders. See RECEIVERS, 16, 17.

MUNICIPAL CORPORATIONS.

Amendment of charters: Constitutional law.

1. Although the constitution (secs. 31, 32, art. IV) has prohibited certain species of special legislation, including that for the enactment or amendment of city charters, and commanded the enactment of general laws enabling the prohibited matters to be done without direct legislative action, such method is not exclusive, and the power to legislate generally, directly affecting such matters, is the same as before. *State ex rel. Risch v. Trustees,* 44

Classification of cities: Validity: Rules: Subdivision.

2. To the four rules stated in *Johnson v. Milwaukee,* 88 Wis. 383, relative to the essentials of a constitutional classification of cities for purposes of general legislation, should be added a fifth, to the effect that the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. *State ex rel. Risch v. Trustees,* 44

3. Such rules do not furnish a certain test by which the constitutionality of a legislative class may be determined, but the particular facts of each particular situation must necessarily be considered, it being kept in mind that the necessity and propriety for classification are primarily legislative questions. *Ibid.*

4. The fact that, at the time of a particular enactment applicable to a class of cities, there is but one member of such class does not militate against the validity of the legislation. *Ibid.*

5. Where cities have been classified on the basis of population, a subdivision of the first class into those having and those not having a paid police department, by an act providing for a pension fund for police officers in those having such paid department,—that feature being made the basis, in the main, of the accumulation of the fund,—is not invalid. *Ibid.*

Cities of first class: Definition: Mistake.

6. Ch. 265, Laws of 1899, was intended to apply to cities of the first class as they existed under sec. 925—1, Stats. 1898, it being clear, when secs. 1 and 17 of the act are read together, that the term "population exceeding 150,000" in sec. 17 was used by inadvertence instead of "population of 150,000 or over." *Ibid.*

Ordinances: Validity.

7. An ordinance within the power of the city council cannot be held void on the ground that the council or its members acted from improper motives, at least in the absence of corruption or fraud. *Tilly v. Mitchell & Lewis Co.* 1

8. The ground upon which ordinances wholly unreasonable are held void is that they are beyond the power of the council. *Ibid.*

Pensions for policemen, etc. See MUNICIPAL CORPORATIONS, 5, 6. PENSIONS.

Contracts for public works: Mistake of city engineer: Damages: Waiver.

9. Under a contract with a city for the construction and placing of a waterworks crib in Lake Michigan, as practically construed by the parties, it is *held* that it was the duty of the city engineer to relocate the spot previously agreed upon, and that the city was responsible for his mistake in so doing and the damage, resulting from the consequent misplacing of the crib. *O'Neill v. Milwaukee,* 32

10. The board of public works of the city, after being informed of the facts and notified by plaintiff that he would look to the city to make good to him the damages, insisted that plaintiff complete his contract, and he did so by moving the crib to the proper place and repairing the damage caused by the mislocation, under protest of any waiver of his claim for the extra expense. *Held,* that he did not thereby waive such claim. *Ibid.*

Streets: Vacation: Who may question.

11. Where the proposed vacation of a part of a street and occupation thereof by private individuals pursuant to city ordinances will greatly depreciate the value of lots fronting on other parts of said street, the threatened injury to the owners of such lots is a special or peculiar one, differing in kind from that to be suffered by the general public and entitling them to sue on their own behalf to have such ordinances declared void. *Tilly v. Mitchell & Lewis Co.* 1

12. An ordinance vacating portions of a street for the reasons, stated therein, that such portions are of no public utility and that the public interest requires such vacation, cannot be successfully attacked on the ground that its sole purpose was that the vacated portions might be devoted to private uses contrary to the public interest. *Ibid.*

Same: Private bridges over streets.

13. A city council has no power to grant to private individuals a right to construct a building or bridge over a public street to connect the buildings on the sides thereof, although passageway for public travel be left beneath. *Ibid.*

Same: Defects causing injury or death: Electric wires.

14. In an action against a city for death caused by defective insulation of electric lighting wires owned by a lighting company, by reason whereof the current passed into a guy wire so located that a person following the usual course of travel on the street was liable to come in contact with it, as plaintiff's intestate did, the complaint alleged that such condition was known to the city or had existed for so long a time before the accident that the city ought, in the exercise of ordinary care, to have known of and remedied the defect. *Held,* that the indefiniteness in the statement as to the length of time the defective insulation had existed did not render the complaint insufficient, but could be taken advantage of, if at all, only by motion. *Wilbert v. Sheboygan,* 518

[15. Whether, if it should appear that the alleged defect was discoverable only by an inspection by an electrician, the city could be held liable on the ground that it was its duty to make such inspection of the appliances of a lighting company occupying its streets, not determined.] *Ibid.*

Same: Storage of vehicles: Liability: Notice: Evidence.

16. Long-continued use of a street for such a purpose as the leaving of vehicles or other objects therein may render it unsafe for public use so as to charge the municipality with liability for resulting injuries. *Radichel v. Kendall,* 560

17. It need not be shown in such case that any particular vehicle had been customarily left in the particular way and at the precise place where the one causing the accident in question was at that time; but it is sufficient if it be shown that the leaving of that vehicle was a continuance of a customary use, permitted by the municipality, of the street in that immediate vicinity as a storage place for vehicles temporarily out of use, to such an extent as to render the street unfit for public travel. *Ibid.*

18. Nor is it material that such leaving of vehicles in the street was for the convenience of the owners thereof while their horses were being cared for temporarily in a nearby barn. *Ibid.*

19. Error in admitting evidence in such a case, that the defendant had allowed other places in its streets to be obstructed by the leaving of vehicles therein, is *held* to have been so far cured as not to have prejudiced the defendant by a direction to the jury to disregard such evidence. *Ibid.*

20. Evidence of statements of the president of a village, subsequent to the accident in question, showing knowledge prior to the accident that the street was used as alleged, was admissible upon the question of notice. *Ibid.*

Sidewalks: Defects causing injuries: Who is a traveler: Contributory negligence: Notice of defect.

21. The occupant of a corner building who, upon returning home at night and finding the front entrance locked, went upon the sidewalk around the corner to a side entrance, was a traveler upon the street within the contemplation of sec. 1339, Stats. 1898, giving a right of recovery for injuries sustained by reason of any insufficiency or want of repair in a street. *Strack v. Milwaukee,* 91

22. Plaintiff was injured at night by stepping into a hole in the sidewalk near his dwelling. The night was dark, and the street lights had been extinguished. Plaintiff had for some time known, generally, of the defective condition of the walk at or near the place of accident, but did not at the time have it in mind, as he was thinking of the serious nature of the illness of a friend he had just left. *Held,* that the question of contributory negligence was properly left to the jury. *Ibid.*

23. In an action for injury alleged to have been caused by a defective sidewalk, a complaint alleging that a cross-plank of the walk was broken and depressed at the center to the ground, is not insufficient merely because it fails to state the depth of the hole. *Lyon v. Grand Rapids,* 609

24. Where plaintiff knew of the hole in a sidewalk into which she stepped and was injured, contributory negligence in not re-

membering and avoiding the danger is presumed in the absence of satisfactory excuse for forgetting it. *Ibid.*

25. The evidence in this case—to the effect that the accident happened in the evening when it was quite dark; that plaintiff was carrying several things which somewhat occupied her attention; that when near the hole her husband, who was a short distance ahead of her, called to her to hurry up; that this drew her attention to him; and that almost immediately thereafter she stepped into the hole—is *held* such that the jury might reasonably have found that plaintiff was excusable for not remembering the defect. *Ibid.*

26. After plaintiff had testified in a manner indicating that she was traveling on the walk regardless of the defect and without any reasonable excuse therefor, a question asked by her counsel, "Did the things you had in your arms, as you have described them, have any effect upon your attention?" was leading and improper. *Ibid.*

27. Evidence as to a generally defective condition of the sidewalk causing the injury—in this case the breaking down of a strong plank—had no relation to such general condition; and where, under such circumstances, the evidence is admitted in a way indicating that it may be considered upon the question of constructive notice of the defect complained of, the error is prejudicial. *Ibid.*

28. The question whether a defect in a sidewalk had existed long enough to enable the city by the exercise of ordinary care to discover and remedy it before the accident, is a single question, proper to be submitted for special verdict without division. Ibid.

29. In submitting such question to the jury, the law applicable to the fact should not be embodied therein, as by asking whether the defect had existed long enough to *make it the duty* of the city to discover and repair it. *Ibid.*

30. Upon the question, submitted for special verdict, whether plaintiff was guilty of any want of ordinary care which contributed to the injury, defendant is entitled, upon proper request, to have the jury instructed that a *slight* want of ordinary care on the part of plaintiff which contributed to the injury is sufficient to require an affirmative answer; but if the instruction as requested omits the essential element that the slight want of care *contributed to the injury*, its refusal is not error. *Ibid.*

31. In an action for injuries caused by a defect in a sidewalk of which plaintiff had prior knowledge, defendant is entitled, upon request, to have the jury instructed, upon the question of contributory negligence, that plaintiff's knowledge of the defect made it her duty to use greater care than would otherwise have been required of her in order to come up to the standard of ordinary care. *Ibid.*

Same: Description of defect: Variance: Notice: Contributory negligence.

32. In an action for personal injuries alleged to have been caused by a defective sidewalk, the complaint described the defect as a hole caused by the adjoining edges of two planks having rotted away. The notice of injury had described it as a hole caused by the fact that a considerable portion of two planks had rotted away *and broken;* and the evidence showed that

besides the complete rotting away of a portion of the planks the partially rotted edge of one had been splintered and broken so as to enlarge the hole. *Held*, that the variance was not material, and, though the description in the complaint might apply to another defect in the vicinity, such ambiguity could not be ascribed to any purpose to mislead. *Duncan v. Grand Rapids*, 626

33. An amendment of the complaint, in such case, to conform to the evidence being unnecessary, the allowance of such an amendment was without prejudice. *Ibid.*

34. A witness who had made measurements to ascertain the exact location of the defect several days after the injury, and after the planks had been removed, claimed to be able to locate the place by his memory and by a gathering of rotten wood on the ground which he had observed under the hole while the sidewalk was in place at and before the time of the injury. *Held*, that his testimony as to measurements was admissible. *Ibid.*

35. Where an injury was caused by a rotted hole in a plank sidewalk, evidence that there were other similar holes and that the whole walk was old, worn out, and rotten, was admissible. *Ibid.*

36. One who, having no prior knowledge of defects, was injured by stepping into a rotted hole in a sidewalk upon a main street of a city, was not guilty of contributory negligence, as matter of law, merely because, as she passed along, she was engaged in conversation and gave no particular attention to the surface of the walk, although she had observed that it was a plank walk and in places was "kind of teetery." *Ibid.*

Claims: Appeal: Limitation.

37. Under ch. 68, Laws of 1901, if no notice of the action or nonaction of a city council upon a claim is served upon the claimant, the right to appeal is not limited to eighty days after the filing of the claim, as provided in sec. 925—60, Stats. 1898. *Lyon v. Grand Rapids*, 609

NEGLIGENCE.

Negligent or malicious act: Pleading: Variance. See APPEAL, 12.

1. Mere proof of an injury caused by ordinary negligence is not sufficient to establish a cause of action for a wanton injury; and in an action for the latter plaintiff cannot recover for the former, if seasonable objection is made. *Turtenwald v. Wis. Lakes I. & C. Co.* 65

Injury to passenger. See STREET RAILWAYS, 2, 3.

Injuries to travelers on streets: Collisions. See STREET RAILWAYS, 1.

2. The driver of an ice wagon who allows his team to proceed along the street without guidance, while his entire attention is devoted to preparing the ice for delivery, cannot be said as a matter of law to be free from negligence if the team runs against and injures a person on the street. *Turtenwald v. Wis. Lakes I. & C. Co.* 65

Same: Contributory negligence.

3. Plaintiff, a street cleaner, whose duties required him to move about on the street without taking any particular course and to make frequent trips to the side of the street to empty his shovel, was working to the westward on the south side of an

asphalted avenue and had just turned to the left to go to the curb when he was run down by the team attached to an ice wagon proceeding westward without guidance from the driver, who was otherwise engaged. *Held*, that plaintiff's failure to look for teams approaching from behind him was not contributory negligence as matter of law. *Ibid.*

Injury to hotel guest: Open elevator door: Contributory negligence.

4. A guest in an hotel, familiar with the elevator, which was in a dark corner and not lighted in the daytime, approached it, having in mind the question whether the car was there or not, but it was too dark for him to see, although he looked. The door stood about half open. He pushed it open with his shoulder, stepped in, and fell down the shaft. A few moments before, he had stepped into the car through the door, which was then fully open. *Held*, that he was guilty of contributory negligence as a matter of law. *Bremer v. Pleiss*, 61

Injuries to employees. See MASTER AND SERVANT. RAILROADS.

Defective highways and sidewalks. See HIGHWAYS. MUNICIPAL CORPORATIONS, 14–36.

Contributory negligence. See MUNICIPAL CORPORATIONS, 22, 24, 25, 30, 31, 36. NEGLIGENCE, 3, 4. RAILROADS, 3. STREET RAILWAYS.

Negligence in signing contract. See CONTRACTS, 1–5.

NEGOTIABLE INSTRUMENTS. See EXECUTORS, 2, 3. MORTGAGES, 3.

NEW TRIAL. See APPEAL, 18, 19. JUDGMENT, 1. STREET RAILWAYS, 2.

NOTICE.
Of appeal. See APPEAL, 1–3.
Of claim for additional time. See CONTRACTS, 7.
Of pendency of application. See DRAINS, 1.
Of hearing petition. See GUARDIAN AND WARD, 2.
Proof of publication. See INSOLVENCY, 6.
Of vicious propensity of horse. See MASTER AND SERVANT, 3.
Of defects in streets, etc. See MUNICIPAL CORPORATIONS, 14, 15, 20, 22, 24, 25, 28, 29, 35.
Of injury. See MUNICIPAL CORPORATIONS, 32.
Of action or nonaction by council. See MUNICIPAL CORPORATIONS, 37.
Of dangers of work. See RAILROADS, 1.
Of motion. See RECEIVERS, 16, 17.
Of rights of other persons. See VENDOR AND PURCHASER, 1.

NUISANCES. See DRAINS, 2–5.

OFFICERS.
When subject to penalties. See PENALTIES.
When warrant no protection for arrest. See JUSTICES' COURTS, 4.
Omissions by court officers: Effect. See DESCENT, 3.

OMISSIONS.
By parties or attorneys: Curing. See APPEAL, 5–9.
By court officers: Effect. See DESCENT, 3.

OPINION EVIDENCE. See EVIDENCE, 4–8.

OPINIONS by supreme court. See APPEAL, 16.

ORDERS.
What are: Evidence. See INSOLVENCY, 5.
Ex parte, when proper. See RECEIVERS, 16, 17.
Setting aside by successor judge. See JUDGES.
What reviewable on appeal from judgment. See APPEAL, 11.

ORDINANCES. See MUNICIPAL CORPORATIONS, 7, 8, 11, 12.

PARENT AND CHILD. See DESCENT.

PAROL EVIDENCE affecting writings. See EVIDENCE, 3. VENDOR AND PURCHASER, 2.

PARTIES. See APPEAL, 1, 2, 21. CORPORATIONS, 3, 6–13. CREDITORS' ACTION, 5. INSOLVENCY, 2. JUSTICES' COURTS, 7. MUNICIPAL CORPORATIONS, 11. RECEIVERS, 3, 4, 18, 22.

PARTNERSHIP.

See COSTS, 4.

1. In an action to dissolve an alleged partnership and for an accounting, findings of the trial court—to the effect that no partnership ever existed between the parties; that of certain goods which plaintiff claimed to have furnished and put into the business, a part had been purchased and paid for by defendant and a part had merely been placed in defendant's store for sale; and that defendant, having had the benefit or received the proceeds of the latter, was liable to plaintiff in a certain sum as a balance over and above payments thereon—are *held* to be sustained by the evidence. *Ehrlich v. Brucker*, 495

2. In an action to charge as partners persons whose signatures appeared in a book in which had been pasted the articles of copartnership of a Farmers' Union—some of the signatures being upon sheets inserted by pasting and some upon the pages of the book itself—the evidence (discussed in the opinion) is *held* sufficient as to the signatures on two of the pasted sheets, and also as to those in the book itself, to sustain a verdict to the effect that at all times when such signatures were being made the articles of partnership were annexed to such sheets or book, and that the signers intended to subscribe such articles. *Moore v. Dickson*, 591

3. As to another of such pasted sheets the evidence is *held* insufficient to show that the articles were annexed thereto at the several times when the signatures on it were made, but sufficient as to some of the signers thereon, though insufficient as to others, to warrant the inference that they intended, at the time of signing, to join the partnership. *Ibid.*

4. As to one M., whose name appeared on a small slip pasted in the book, and who denied that he ever signed, the testimony of another defendant whose name was on the same slip, that both he and M. signed at the same time with the declared purpose of becoming parties to the agreement, is *held* sufficient, together with some evidence of the authenticity of M.'s signature, to take to the jury the question whether he signed for the purpose of joining the partnership. *Ibid.*

PAYMENT.

On order or judgment afterwards vacated: Recovery. See JUDGMENT, 2, 3. RECEIVERS, 33, 34.

Partial performance: Apportionable contract. See SALES, 5.

Overpayment for land: Recovery. See VENDOR AND PURCHASER, 2.

Of mortgage debt: Assumption by purchaser. See VENDOR AND PURCHASER, 3–5.

By beneficiaries on purchase by trustee. See VENDOR AND PURCHASER, 6.

PENALTIES.

Upon members of board of review: Validity: Pleading, etc. See PLEADING, 4.

1. An act (sec. 5, ch. 379, Laws of 1901) imposing a penalty upon any member of a board of review who shall intentionally omit to perform official duties imposed upon him by law, does not contravene any constitutional provision or violate public justice. *State v. Zillmann,* 472
2. The word "intentionally," in sec. 5, ch. 379, Laws of 1901 (imposing a forfeiture upon any member of a board of review who "shall intentionally omit or agree to omit from assessment any property liable to taxation," etc.), imports wilfulness, evil intent, or unlawful purpose; and a complaint for recovery of such a forfeiture, charging the fact in the language of the statute, need not allege in terms that the property was unlawfully, wilfully, or corruptly omitted. *Ibid.*
3. An allegation, in such a complaint, that the property omitted was then and there liable to taxation in the assessment district of which defendant was an officer, is sufficient, without further specifically alleging that it was so liable to taxation on the 1st of May in that year as provided in sec. 1033, Stats. 1898. *Ibid.*
4. An allegation that defendant "as member of said board of review" did intentionally omit, etc., sufficiently alleges that he acted in his official capacity. *Ibid.*
5. Failure to describe specifically the property omitted, does not render the complaint insufficient, but can be taken advantage of, if at all, only by motion to make more definite and certain. *Ibid.*

PENALTY or liquidated damages? See CONTRACTS, 8.

PENSIONS.

See MUNICIPAL CORPORATIONS, 5, 6.

1. Continuance of a policeman in the service of a city after the enactment of a statute providing for a pension to his widow in case of his death while in such service, does not create any contractual or vested right, with reference to such pension, which cannot be taken away by subsequent legislation. *State ex rel. Risch v. Trustees,* 44
2. Where a statute in form requires police officers to pay certain sums per month out of their salaries into a pension fund, but in fact such sums are merely set apart by the city for said fund and the salaries actually paid to the officers are reduced accordingly, the moneys going into said fund do not at any time cease to be public moneys, and a police officer does not acquire any contractual or vested rights in respect to such fund prior to the happening of the particular event upon which the pension in his case becomes payable. *Ibid.*
3. Ch. 265, Laws of 1899, "an act to create a pension fund for members of police departments in cities of the first class," expressly provided that its provisions should "be amendatory of the charter of all cities of the first class in this state containing a population exceeding 150,000;" and all conflicting provisions in such charters or any other law were repealed. Milwaukee

was the only such city in the state. *Held*, that the manifest legislative intention was to amend the Milwaukee city charter, and that the new act should be exclusive, superseding and repealing prior acts (ch. 287, Laws of 1891, and ch. 379, Laws of 1895) on the same subject. *Ibid.*

PHOTOGRAPHS. See EVIDENCE, 8.

PHYSICIANS AND SURGEONS. See EVIDENCE, 4-7.

PLEADING.

Scope of the Code: Forms.

1. The doctrine that the Code furnishes a new and complete system of procedure as regards forms of action, and a substitute as regards names and general characteristics for common-law pleadings, and a system of procedure as regards the same, does not mean that such system includes a form for pleadings and judgment, or for all mere details of practice. *Harrigan v. Gilchrist* (48) 136, 277

Complaint: Joinder of causes of action.

2. A misjoinder of causes of action is waived by the defendant if complaint be not seasonably made in the manner prescribed by statute. *Id.* (49) 137, 278

3. All of a series of acts having in view the consummation of a single fraudulent purpose, regardless of the number of persons concerned therein, are parts of one subject matter; and where that is a primary subject of action or is an incidental part of a subject of controversy including it and other matters, however numerous, the entire subject matter may be brought into a single action for adjudication. *Id.* (56) 138, 288, 289

Same: Conditions precedent. See CREDITORS' ACTION, 4.

Construction. See PENALTIES, 3-5.

4. In a civil action to recover a forfeiture the pleadings are to be construed liberally. *State v. Zillmann,* 472

Same: Demurrer.

5. Upon demurrer, all reasonable inferences that can be drawn from the language of a pleading to support it are to be indulged in, rather than such as will defeat it. *Wilbert v. Sheboygan,* 513

Demurrer ore tenus. See CREDITORS' ACTION, 4.

Indefiniteness. See MUNICIPAL CORPORATIONS, 14, 23. PENALTIES, 5.

Amendment, and supplemental pleadings. See ACTION, 1. CORPORATIONS, 4. CREDITORS' ACTION, 2, 3. JUDGMENT, 1. MUNICIPAL CORPORATIONS, 33.

6. The issues, upon the pleadings, were whether defendant's agents made a certain agreement with plaintiff, and whether they had authority to bind defendant thereby. The court found that they made the agreement, but that they were induced to do so by plaintiff's false statements. It rendered judgment for defendant without passing upon the question of the agent's authority. The finding of fraud was amply sustained by the evidence, which was introduced on both sides without objection. *Held*, on appeal, that this court will, in support of the judgment, consider the pleadings as having been amended to conform to the facts proved. *Rule v. J. L. Gates Land Co.* 544

Variance. See ACTION, 1. APPEAL, 12. MUNICIPAL CORPORATIONS, 32. NEGLIGENCE, 1. PLEADING, 6. TRUSTS, 9.

PLEDGES AND COLLATERAL SECURITY. See CORPORATIONS, 16, 17. MORTGAGES, 1, 2. RECEIVERS, 6–8, 12.

POLICE COURT in Milwaukee. See JUSTICES' COURTS, 1, 2.

POLICE POWER. See DRAINS, 2–4.

POLICEMEN'S PENSION FUND. See MUNICIPAL CORPORATIONS, 5, 6. PENSIONS.

POSSESSION.
Of land. See VENDOR AND PURCHASER, 1.
Of personalty. See REPLEVIN. VENDOR AND PURCHASER, 1.

POWERS.

A testator devised land to his wife for her life and gave her also an absolute power of disposition thereof, unaccompanied by any trust. Any part thereof which might remain at her death he gave to his children. The widow sold a portion of the land and gave a warranty deed thereof, which was intended by her to convey the fee, but which made no specific reference to the will or the power of sale therein contained. *Held*, that the grantee was a purchaser within the meaning of sec. 2108, Stats. 1898; that in respect to his rights the estate of the widow was a fee by virtue of that section; and that the sale and conveyance by her was such an execution of the power as that section contemplates. *Auer v. Brown*, 115

PRACTICE. See ABATEMENT. ACTION. APPEAL. CORPORATIONS. COSTS. COURTS. CREDITORS' ACTION. DESCENT, 1, 3. EVIDENCE. GUARDIAN AND WARD. INSOLVENCY. JUDGES. JUDGMENT. JURY. JUSTICES' COURTS. PLEADING. RECEIVERS, 1, 4, 16, 17–34. REPLEVIN. TRIAL. VERDICT. WITNESSES.

PRESUMPTIONS. See APPEAL, 14f, 15. COURTS, 10. MUNICIPAL CORPORATIONS, 24.

PRINCIPAL AND AGENT.

See DEEDS, 1. MASTER AND SERVANT. RECEIVERS, 2, 3, 19. SALES, 1–3.

The unsworn statements of an agent outside of the scope of his agency are not proof of the matters indicated therein as regards his principal. *Harrigan v. Gilchrist* (87) 142, 365–374

PRINTED CASE. See APPEAL, 22.

PRIOR ACTION. See COURTS, 11. GUARDIAN AND WARD, 6.

PRIORITY of lien. See MORTGAGES, 1, 2.

PROCESS: Service: Fraud. See COURTS, 8.

PROMISSORY NOTES. See EXECUTORS, 2, 3. MORTGAGES, 3.

PROPRIETARY MEDICINES. See TRADENAMES.

PROXIMATE CAUSE. See RAILROADS, 2.

PUBLIC WORKS. See MUNICIPAL CORPORATIONS, 9, 10.

RAILROADS.

Negligence: Injuries to employees.

1. As to the engineer and fireman of an engine sent to assist in putting out the fire on a burning railway bridge whose exact location they knew, there was no duty on the part of the railway company to display signals or give other warning of the

location and condition of the bridge; and such employees assumed the risks ordinarily incident to the work. *Kath v. Wis. Cent. R. Co.* 503

2. In an action for injuries to a locomotive fireman, caused by the fall of his engine through a burning bridge, the complaint charged specifically, among other things, that the engineer was negligent in failing to stop before reaching the dangerous place. This charge was apparently lost sight of on the trial. There is no affirmative evidence that it was abandoned and, though the issue was not covered by the special verdict, the form of the verdict itself shows that the charge was not deemed to have been proven by uncontradicted testimony. The jury found that failure to display signals or give warning of the danger was the proximate cause of the injury. *Held*, that this excluded another proximate cause, and plaintiff cannot have a judgment in his favor affirmed on the ground that the negligence of the engineer was conclusively established. *Ibid.*

3. Whether the fireman was himself negligent in failing to warn the engineer of their approach to the burned portion of the bridge is *held*, upon the evidence, to have been a question for the jury. *Ibid.*

REAL PROPERTY. See DEEDS. DRAINS. EXECUTORS. INJUNCTION. LIENS. MORTGAGES. POWERS. SALES, 4. VENDOR AND PURCHASER.

RECEIVERS.

When appointment not necessary: Creditors' action.

1. It is not an absolute essential to a creditors' action that there shall be a receiver. If only an accounting is sought and there is no need of a provisional remedy because there is no property to be previously conserved, no receiver need be appointed. In any event the creditors' action proceeds from the commencement under their control and the direction of the court, regardless of whether there is a receiver or not. *Harrigan v. Gilchrist* (44) 136, 270

Appointment procured by collusion or fraud: Position as to creditors.

2. If a receiver, appointed in an action in form to administer the property of an insolvent corporation for the benefit of its creditors, is imposed upon the court by keeping therefrom knowledge of the real purpose of those who nominate him, in the interest of the corporation or its officers, or both, he is to be deemed, as to creditors, the agent of their adversaries. *Harrigan v. Gilchrist* (54) 137, 284, 290, 302

3. A receiver collusively appointed as above indicated, and enabled to use his office for the benefit of those who are in an adversary capacity to creditors, is not entitled to the usual protection afforded receivers; but may be dealt with, if the court so orders or permits, as a mere agent for such adversaries, and as such made a defendant in the main or an independent action, as the court may order or permit, and his conduct judicially investigated in that way and his liabilities enforced by the instrumentalities afforded thereby. In that situation the receiver and his co-wrongdoers may properly be made defendants independently of the statutes, and under secs. 3237 and 3239 thereof as well. *Id.* (55) 137, 282–293

4. If, pending an administration suit, before final judgment, even after the property has been distributed by order of the court, it is claimed upon reasonable ground that the receiver was, by a fraud, introduced into the action to aid the officers of the insolvent to carry out a preconceived design to defraud its creditors while pretending to act as the agent of the court,—it is permissible to make such receiver and his alleged guilty associates defendants in such suit as a method of requiring the receiver to account; and regarding him and his co-wrongdoers as standing for matters germane to the subject of the action, as may properly be done, such practice is fully approved. *Id.* (60) 138, 302

Receiver is a trustee for creditors. See CORPORATIONS, 7.

Relation to winding-up action by creditors. See CORPORATIONS, 10, 11.

Relation to creditors having security. See CORPORATIONS, 16, 17.

Management of property: Hypothecated assets: Uncompleted contracts.

5. A receiver is expected to apply to the execution of his trust the discretion of an ordinarily careful business man in business pursuits of a somewhat similar nature, acting in ordinary matters, and as to mere details in others, upon his own judgment without responsibility for losses happening through mere mistakes of judgment. *Harrigan v. Gilchrist* (100) 144, 384, 385

6. A receiver may properly, acting in good faith, at his own expense conserve an equity belonging to the trust if the court, with knowledge of the situation, decides that it were better such equity should be lost than to burden the trust fund to save it. *Id.* (67) 139, 328

7. A receiver, acting under the circumstances above indicated, may be deemed to have an equitable lien upon the property conserved for the amount of his reasonable expenditures, any profit obtained to inure to the trust fund. *Id.* (68) 140, 328

8. A receiver is not guilty of wrongdoing, necessarily, because he incurs expense in the collection or conservation of a liability validly hypothecated by the insolvent as security for a debt owing by him, because he has no reason to expect such hypothecation to yield a surplus for the trust fund. *Id.* (74) 140, 343

9. Under no circumstances can a receiver rightly speculate with the subject of his trust for his private gain. *Id.* (69) 140, 325, 326

10. Oral evidence as to judicial advice in the administration of a receivership matter is not necessarily to be rejected or condemned as false. *Id.* (70) 140, 329

11. A misstatement of facts by fraud, negligence, or mistake, in a petition for judicial advice in a receivership matter, reasonably calculated to influence action to the prejudice of creditors and which has that effect, is a sufficient ground in the same jurisdiction to support an application by such creditors, seasonably made while the court there has control of the matter, for relief. *Id.* (71) 140, 337–339

12. A receiver may properly burden his trust fund, subject to the approval of the court, with expenses of converting into money choses in action or other property in which he has only an equitable title, creditors of the insolvent having the property as

collateral, though no surplus is obtainable therefrom, if, under the circumstances, that seems for the best interests of general creditors. *Id.* (78) 141, 343-347

13. A receiver may properly be allowed to finish uncompleted contracts of the insolvent, when that, at the time of action in regard thereto, seems for the best interests of general creditors. *Id.* (79) 141, 352

14. The court will not as of course order its receiver to complete unfinished contracts of the insolvent unless necessary to save investments already made, or otherwise save encumbered property, and such completion is clearly required in the interests of general creditors. In other cases the court and its receiver are to act according to their judgment of the probabilities as to general interests. *Id.* (80) 141, 353

15. A going manufacturing business,—with its manufacturer's stock, partly constructed machinery, and partly performed contracts, having large investments therein the safety of which depends on completing such contracts,—having been placed in the hands of a receiver to be wound up for the benefit, primarily, of creditors, many of such contract liabilities being validly hypothecated to creditors of the insolvent, and at the outset an order having been made for the temporary continuance of the business in aid of a conservation of the property for general creditors, with power to borrow money upon the credit of the trust fund therefor,—*held*, that such order, by implication, authorized the receiver to complete such contracts if in his judgment the interests of the trust fund would be best subserved thereby, obtaining special advice of the court in doubtful cases. *Id.* (81) 141, 352-354

Advisory orders may be ex parte.

16. In administering a receivership trust, ordinary advisory orders may properly be granted *ex parte*, and the fact that they are so granted is not evidence tending to show infidelity on the part of the receiver. *Harrigan v. Gilchrist* (91) 143, 384

17. Advisory orders may properly be entered *ex parte* in a receivership matter, and are expected to be so entered as a general rule. *Id.* (99) 144, 384

Compelling accounting.

18. The beneficiaries of a trust fund under the control of a receiver may, by permission of the court to whom the latter is accountable, maintain an action against him to compel him to perform his duty. *Harrigan v. Gilchrist* (34) 134, 252

19. A receiver is the agent of the court, and, as such, trustee for creditors, and is liable to account at such times and to such persons, and in all respects in such manner, as the court, within the broad field of judicial discretion, may determine. *Id.* (35) 134, 253, 254

20. While the usual method of compelling a receiver to account is by summary proceedings in the action in which he was appointed, and the usual way to enforce restitution by him of any sum he may be found upon accounting to have misappropriated or wasted, is by contempt proceedings,—the court, whose agent he is, is not limited to any particular method in that regard. It may adopt any procedure which is reasonable in any view thereof, under the circumstances of the particular

case, including that of making the receiver a defendant in a creditors' action, like any wrongful holder of the trust fund or some part thereof, the action still being open so as to admit of that course, and may require issues to be formed by complaint and answer covering the subject, and the same to be tried in the usual way and closed as a part of the general judgment. *Id.* (36) 135, 253, 301

21. *Boyd v. Mutual Fire Asso.* 116 Wis. 155, so far as it holds that in case a receiver trustee for creditors wastes the trust fund wrongfully by appropriating the same to his own use or otherwise the creditors have no cause of action which by permission of the court to whom the receiver is accountable they may enforce by action in equity, overruled. *Id.* (37) 135, 262

22. The doctrine that no creditor can institute a proceeding to obtain any part of the trust fund in the hands of a receiver until it has been awarded him, does not signify that he has no right of action to enforce the trust so that an order of distribution may be made. *Id.* (42) 136, 269

Examination and settlement of account.

23. A court, within the boundaries of judicial discretion, may make its own rules as regards the time and manner in which its receiver's account shall be examined and passed upon. *Harrigan v. Gilchrist* (101) 144, 414

24. If a court refers its receiver's account for the taking of testimony and reporting the same with conclusions, such proceeding is not governed by the statute or rules of court regarding references of actions for trial. *Id.* (102) 144, 414

25. In case of such a reference of a receiver's account, the court may close the same at any time, discharging the referee and causing the whole subject to be brought before him for settlement in the light of such proceedings as shall have been had before the referee, and such other aids as he may call to his assistance, not transcending sound judicial discretion. *Id.* (103) 144, 414

26. The mere *pro forma, ex parte* settlement of an important receiver's account, where creditors are dissatisfied therewith, *held* to be an indiscretion. *Id.* (106) 145, 433, 434

27. Expense of a receiver in the settlement of his account, caused by creditors contesting matters in respect thereto, which he reasonably incurs, may properly be allowed to him as legitimate charges against the trust fund. *Id.* (115) 146, 446

28. If in the settlement of the receiver's account only creditors are interested adversely to the receiver, and they all in good faith litigate with the receiver matters respecting his final account, resulting in a judgment for costs being rendered against them, the court may properly provide that such judgment shall be paid out of the trust fund, or, if paid by the creditors, that they shall be reimbursed therefor out of such funds. *Id.* (116) 146, 450

Compensation and allowances: Legal assistance: Recovery of excessive payments. See CORPORATIONS, 16, 17.

29. It is not essential nor expected that the general attorney for a receiver whose administration is of such a character as to warrant him in burdening the trust with the expenses of legal services of a general and continuous character, will keep an itemized account of services performed by him. The custom

is for the court to allow such sum for expenses of that character as in its judgment the nature of the case reasonably demanded and which were performed. *Harrigan v. Gilchrist* (95) 143, 397, 402, 454

30. The amount allowable for the personal services of a receiver is to be governed by the subject matter of the administration, the care exercised, the degree of success attained, the manner of the accounting, and all other considerations bearing on the actual value thereof, the rate to be that characterizing somewhat similar services in official life. *Id.* (96) 143, 435

31. The expenses allowed a receiver for legal assistance are to be governed by the reasonable necessities in that regard, assuming that the receiver has properly discharged the duties which belong to him personally to perform, the time necessarily spent in the administration, the grade of service required, the efficiency of that rendered, the benefit to the trust, the fidelity displayed, and all other circumstances throwing light on the question, the rate to be that ordinarily paid for somewhat similar services in official life. *Id.* (97) 144, 438

32. The better way to determine the proper amount to be allowed a receiver for legal assistance is to view the whole situation from the standpoint of the results accomplished in the end, without much or any regard to any itemized account. That does not militate against awarding on account reasonable amounts for expenses of that character during the progress of the administration. *Id.* (98) 144, 394–402

33. If an attorney accepts employment from a receiver, and, joining with his employer, submits to the court the question of the amount to be allowed him out of the trust fund for his services, the result is binding on him till set aside in some appropriate way, though the liability to him is personal as regards the receiver; and if thereafter the receiver pays the sum allowed and subsequently the adjudication in respect to such allowance is properly changed, the allowable sum being reduced, a cause of action thereby accrues to the receiver to recover the excess. *Id.* (113) 146, 444

34. An implied promise having been raised as indicated in the foregoing, and become enforcible, interest runs from the date of the payment. *Id.* (114) 146, 444

RECITALS in orders. See APPEAL, 15. INSOLVENCY, 4.

REFERENCE of receiver's account. See RECEIVERS, 24, 25.

REFORMATION of written instruments. See COSTS, 3.

REMOVAL OF CAUSES. See JUSTICES' COURTS, 7.

REOPENING CASE. See JUDGMENT, 1.

REPLEVIN.

See JUSTICES' COURTS, 5–7.

A mere clerical error in the findings and judgment in replevin, in mentioning the cattle seized on the writ and delivered to plaintiff as "six head" instead of seven, is not fatal to the judgment, where the true number appears by enumeration in the findings, and plaintiff is adjudged to be entitled to their possession. *Olson v. Peabody,* 675

RESCISSION of contract. See CONTRACTS, 1–5.

RETURN on appeal from order. See APPEAL, 10.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 11-36.

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" " " VIII (Printed case), 591, 599.
Circuit Court Rule XXII, sec. 6 (Reference), 414.
County Court Rule III, sec. 1 (Guardians *ad litem*), 541.

SALES.

Canceling order before acceptance.

1. An order for goods, given to an agent and not to become binding unless approved and accepted by the vendor, may be withdrawn or canceled up to the time of such acceptance. *L. J. Mueller Furnace Co. v. Meiklejohn,* 605
2. Where in such a case the order was sent to the vendor by mail, the contract became binding at the moment when a postal card of acceptance, properly addressed, was deposited in the postoffice by the vendor, unless the order had been previously withdrawn. *Ibid.*
3. The evidence in this case—tending to show, among other things, that a letter canceling an order was received by the vendor at 2 p. m., and showing that the postal card accepting the order was postmarked at a branch postoffice four blocks from his office at 4 p. m. of the same day—is *held* to justify a finding that the order was canceled before acceptance. *Ibid.*

Contract induced by fraud. See CONTRACTS, 2, 3.

What included as incidents: Lighting plant: Supplies, etc.

4. In the sale of an electric lighting plant, doing public and private lighting under a public franchise, during the monthly period for which bills to customers are customarily rendered, there being some coal and other supplies on hand for immediate use in that regard, the intention being obvious that the sale was intended to carry, as incident to the property, the going business, nothing appearing to the contrary, such sale impliedly includes such unfinished monthly contracts and the supplies on hand, they being deemed mere incidents of the plant. *Harrigan v. Gilchrist* (88) 142, 370

Apportionable contract: Partial delivery.

5. A contract for the sale of 200 cords, more or less, of hemlock bark, being the entire product of the vendor for the season, at $5 per cord, to be paid in cash within ten days from receipt in carload lots, is apportionable. The vendor may enforce payment for the portion delivered although he fails to deliver the balance; and the vendee's right to recover damages for such failure to deliver the whole is not conditioned upon payment having been made for the portion received. *Campbell & Cameron Co. v. Weisse,* 491

Property in possession of another: Duty of inquiry. See VENDOR AND PURCHASER, 1.

Sale of trust property to trustee: Validity. See TRUSTS, 6.

SALES OF LAND. See POWERS. SALES, 4. VENDOR AND PURCHASER.

SCHOOLS AND SCHOOL DISTRICTS.

Contracts: Employment of janitor.

1. A contract for the employment of a janitor for a district school can be made only by the district board at a meeting thereof duly called and held. *Mendel v. School District,* 80

Best evidence of acts of school board.

2. The best evidence of the acts of a school board is the record of its meetings, kept by the clerk. *Ibid.*

Establishing text-books: Contracts: Mandamus.

3. The duty of a board of education, imposed by the city charter, "to establish the text-books to be used" in the schools, is persistent and continuous; and the board cannot, certainly without express legislative authority, disable itself to perform such duty by contract or by resolution not to exercise its power for any given period. *State ex rel. Ginn v. Wilson,* 523
4. The action of the board in the performance of such duty will not be dictated or controlled by courts, especially not by *mandamus.* *Ibid.*

SECURITY FOR COSTS. See CONSTITUTIONAL LAW.

SEQUESTRATION. See CORPORATIONS, 14, 18, 19.

SHERIFFS AND CONSTABLES. See JUSTICES' COURTS, 4.

SIDEWALKS: Defects: Injuries. See MUNICIPAL CORPORATIONS, 21–36.

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STREET RAILWAYS.

Injury to traveler on street: Contributory negligence.

1. At about the time the driver of a single horse attached to a buggy turned upon the street railway track in order to cross to the other side of the street, a train came in sight, approaching around the corner at the rate of seven miles an hour. The horse was walking and was gentle and under control. The cars could have been seen when at a distance of ninety-five feet, measuring around the curve of the track. Upon seeing them the driver attempted to back off the track, and at the same time the motorman put on the brakes. The train stopped as the forward car touched the buggy, not injuring it but tipping it slightly, and one of the occupants of the buggy jumped out and was injured. During the time the cars ran the ninety-five feet the horse could have walked at least forty feet and have been beyond all danger. *Held*, that the driver was guilty of contributory negligence. *Hogan v. Winnebago T. Co.* 123

Injury to passenger: Contributory negligence: Instructions to jury.

2. In an action against a street railway company for injuries sustained by a passenger while alighting, though the testimony of plaintiff and her mother, to the effect that the car had stopped and that she was in the act of alighting when it started and caused her to fall, was contradicted by seven witnesses who testified that the car had started and was moving before she attempted to alight, it cannot be held that the trial court erred in refusing to set aside, as against the evidence, a verdict for the plaintiff. *Champane v. La Crosse City R. Co.* 554

3. The jury were charged, in positive and unqualified terms, that if plaintiff undertook to alight from the car while it was in motion she could not recover. Another instruction was to the effect that if they believed the car had stopped for a reasonable time and that plaintiff had given no notice or signal that she wished to get off at that place, and should further believe, that after the car started it occurred to her that she ought to have gotten off, and should believe that she attempted to go out of the car while it was in motion, and should believe that its being in motion was the cause of her falling off, then she could not recover. *Held*, that, although this instruction included elements not necessary to be passed upon by the jury to acquit defendant of liability, yet, considering the charge as a whole, the jury could not have been misled as to the true rule. *Ibid.*

STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 11–36.

SUPPLEMENTAL PLEADING. See CORPORATIONS, 4. CREDITORS' ACTION, 2, 3.

SUPREME COURT. See APPEAL AND ERROR.

SURVIVAL of action. See ABATEMENT.

TAXATION.

Board of review: Meetings: Assessment roll: Directory statute.

Sec. 1060, Stats. 1898, requiring the board of review to meet on the last Monday in June, and sec. 1064, providing that the assessor shall deliver the completed assessment roll to the

clerk on or before the first Monday in August, are directory only, and a failure to comply literally therewith does not invalidate the action of such officers unless the rights of persons interested are thereby materially affected to their prejudice. *State v. Zillmann*, 472

Same: Omission of taxable property. See PENALTIES.

TAXATION OF COSTS. See APPEAL, 21, 22. COSTS, 4.

TERMS of granting or denying motion. See APPEAL, 7, 8.

TITLE.
To land. See DEEDS. INJUNCTION. POWERS. VENDOR AND PURCHASER.
To personalty. See REPLEVIN. VENDOR AND PURCHASER.

TORTS. See APPEAL, 12. DAMAGES. HIGHWAYS. INJUNCTION. JUSTICES' COURTS, 3-6. MALICIOUS PROSECUTION. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 14-36. NEGLIGENCE. RAILROADS. REPLEVIN. STREET RAILWAYS.

TOWNS. See DRAINS. HIGHWAYS.

TRADENAMES.

Where the reputation of a proprietary medicine was partly due to the long experience and great care of a physician who manufactured it for many years, the use, after his death, by a subsequent manufacturer, of labels bearing such physician's name in a way to indicate that he was still living and, if not himself preparing the medicine, was at least superintending its manufacture, is *held* such a deception of the public that a court of equity will not lend its aid to protect the manufacturer from infringements or imitations of his tradenames or labels. *Lemke v. Dietz*, 102

TRESPASS. See INJUNCTION. JUSTICES' COURTS, 3, 4.

TRIAL.

Right to trial by jury. See JURY.

Issues: Variance, etc. See ACTION, 1. APPEAL, 12. NEGLIGENCE, 1. PLEADING, 6. RAILROADS, 2. TRUSTS, 9.

Reception of evidence: Rebuttal: Discretion. See APPEAL, 17.

Same: Leading questions. See MUNICIPAL CORPORATIONS, 26. WITNESSES, 1.

Arguments and conduct of counsel.

1. Remarks of counsel in commenting to the jury upon the evidence are *held*, though technically objectionable, not to have been prejudicial. *Wysocki v. Wis. Lakes I. & C. Co.* 96
2. An objection in this case to the conduct of plaintiff's counsel in stating to the jury the effect of certain answers to the special questions having been sustained by the trial court, there was no prejudicial error. *Lyon v. Grand Rapids*, 609

Taking case or question from jury. See MALICIOUS PROSECUTION, 2. MUNICIPAL CORPORATIONS, 36. NEGLIGENCE, 2-4. PARTNERSHIP, 2-4. RAILROADS, 3.

Instructions to jury. See MUNICIPAL CORPORATIONS, 30, 31. STREET RAILWAYS, 3.

3. For the trial court to state that instructions are given at the request of one party or the other, though not ordinarily ground for reversal, is not advisable practice. *Wysocki v. Wis. Lakes I. & C. Co.* 96

4. Where a special verdict is taken it is error for the court to inform the jury as to the effect of their findings by instructing them in regard to the law applicable to the facts as they may find them. *Lyon v. Grand Rapids,* 609

[5. Whether an instruction that, "the whole twelve jurors must approve of and agree to all and every one of the answers made and returned" was error, for the reason that it gave the jury to understand that they could not disagree but that an agreement one way or the other was compulsory, not decided.] *Duncan v. Grand Rapids,* 626

Verdict. See MUNICIPAL CORPORATIONS, 28, 29. TRIAL, 4, 5. VERDICT.

Findings of fact: Preparation by attorney.

6. Tested by custom, it is not improper for a referee or a court to delegate to an interested attorney the labor of preparing findings of fact and conclusions of law for the approval and sanction of such referee or court, though the practice itself, aside from such custom, is of doubtful propriety and its discontinuance is advised, this, however, being expressed in the opinion as a personal view of the writer thereof. *Harrigan v. Gilchrist* (105) 145, 396, 419

Reopening case: Decision at variance with announced opinion. See JUDGMENT, 1.

Waiver of objections, etc. See APPEAL, 12. PLEADING, 6.

New trial after reversal of judgment. See APPEAL, 18, 19.

TRUSTS AND TRUSTEES.

See CORPORATIONS, 3, 6–11. EQUITY, 6. EXECUTORS, 5. RECEIVERS. VENDOR AND PURCHASER, 5, 6.

1. A trust as to property having been established, the trustee cannot end his relations to the *cestui que trust* by destroying the identity of the subject of the trust. Such identity being lost, the trustee is yet liable to account in equity to the beneficiary for the loss. *Harrigan v. Gilchrist* (30) 134, 251

2. The doctrine, that when property once impressed with a trust entirely loses that character it cannot be followed and recovered *in specie,* has no application to the subject of whether a trustee may end his personal relations as such by a destruction of the trust fund. *Id.* (31) 134, 250

3. The doctrine that when the subject of a trust has been destroyed the liability of the trustee is at law, recognized; but the better and common doctrine *held* to be that the trustee is liable in a suit for an accounting as before indicated, and especially where his liability is incidental to a proper subject matter of an action in equity. *Id.* (32) 134, 252

4. A cause of action to compel an unfaithful trustee and those colluding with him in wasting a trust fund, to account therefor,

is not one sounding in tort, though the facts may be such that an action for damages for the wrong might lie. *Id.* (33) 134, 252

5. Where several persons, in collusion with each other, misappropriate or so waste or misapply property as to become chargeable for the wrong as trustees thereof, they are jointly liable for the entire loss, regardless of the extent to which they may severally have been enriched. *Id.* (51) 137, 280

6. If a trustee, whether from good or bad motives, or whether the result be detrimental or beneficial to his *cestui que trust*, becomes a purchaser of the trust property, either directly or by concurrence with another as his agent or associate, the transaction is voidable at the election of such *cestui que trust* if he acts seasonably. *Id.* (84) 142, 363

7. In the circumstances last mentioned the *cestui que trust*, by his own act or by the court acting judicially to redress the wrong, cannot, surrendering the property to the wrongful holder, recover more than the damages sustained. *Id.* (85) 142, 363

8. Creditors having elected to surrender the property as above indicated, and by untenable claims and misapplication of the law obtained an erroneous judgment requiring much time and expense to obtain a correction of the error, rendering it likely that changes may probably have occurred in the meantime, and there being no real benefits recoverable, it is proper to regard their rights as foreclosed. *Id.* (86) 142, 364

9. A person having property alleged to belong to a trust fund which he ought to restore thereto, being prosecuted for an accounting and charged with having obtained possession thereof by fraud, fraud failing, yet wrongful possession of the trust fund being fully established, the proper judgment enforcing restoration may be rendered. *Id.* (112) 146, 442

UNDERTAKINGS. See APPEAL, 3–7.

UNDUE INFLUENCE. See DEEDS, 5.

UNFAIR COMPETITION. See TRADENAMES.

UNREASONABLE ORDINANCES. See MUNICIPAL CORPORATIONS, 7, 8.

VACATION.
Of orders, judgments, etc. See JUDGES. JUDGMENT.
Of streets. See MUNICIPAL CORPORATIONS, 11–13.

VARIANCE. See ACTION, 1. APPEAL, 12. MUNICIPAL CORPORATIONS, 32. NEGLIGENCE, 1. PLEADING, 6. TRUSTS, 9.

VENDOR AND PURCHASER OF LAND.

Property in possession of another: Duty of inquiry.

1. Although the vendor of land and of personalty had record title to the land and apparent title to the personalty under bills of sale, the facts that the land was not in her possession but in the possession of the heir of a person under whom she claimed, and that the personalty was held by the special administrator of said person, are sufficient to put the purchaser, having knowledge of such facts, upon inquiry as to the vendor's actual rights. *Ward v. Russell.* 77

Mutual mistake as to quantity: Recovery of overpayment.

2. Where, pursuant to an oral agreement for the sale of a tract of land at a certain price per acre, the land was conveyed, but, by a mutual mistake of the parties as to the real number of acres, the consideration recited in the deed and actually paid was excessive, the agreement was not merged in the deed, but may be shown by parol evidence, and the overpayment may be recovered. *Ohlert v. Alderson*, 86 Wis. 433, distinguished. *Butt v. Smith*, 566

Incidents of property sold: Lighting plant: Supplies. See SALES, 4.

Assumption of mortgage: Conveyance to third person: Trust.

3. An agreement by the purchaser of land to assume and pay a mortgage thereon given by the vendor must, in order to be valid, be express. It cannot arise from any mere implication or legal imputation. *Arnold v. Randall*, 462

4. At the request of the purchasers of land, it was conveyed by the vendor to a third person, and by the terms of the deed the grantee assumed a mortgage on the land as a part of the purchase price. Said grantee, in fact, took title merely as an accommodation to the real purchasers, and afterwards conveyed to another at their request. There being no evidence of an express promise by such purchasers to pay the mortgage debt, there could be no implied promise upon which the mortgagee could sue. Their implied promise, if any, would be merely to pay the purchase price to the vendor. *Ibid.*

5. Under sec. 2077, Stats. 1898, providing that no trust results in such a case, but that absolute title vests in the grantee except as against creditors, the purchasers cannot be held to be the real grantees so as to be bound by the declaration in the deed that the *grantee* assumed the mortgage. *Ibid.*

Conveyance to trustee: Liability of beneficiaries for purchase price.

6. Upon a conveyance of land to a trustee, not naming the beneficiaries, but vesting the legal title in him, the beneficiaries are not liable for any part of the purchase price upon the trustee's promise to pay. *Ibid.*

VERDICT.

See APPEAL, 18, 19. MUNICIPAL CORPORATIONS, 28, 29. TRIAL, 4, 5.

1. The form of a special verdict is very much in the discretion of the trial court. *Hebbe v. Maple Creek*, 668

2. A question, submitted for a special verdict, as to whether a stone constituted a defect in the highway which was the proximate cause of an accident, was double, but being answered in the affirmative under instructions clearly explaining it, there was no prejudicial error. *Ibid.*

VESTED RIGHTS. See PENSIONS, 1, 2.

VICE PRINCIPALS. See MASTER AND SERVANT.

VICIOUS ANIMALS. See MASTER AND SERVANT.

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Of claim for additional time. See CONTRACTS, 7.
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Of misjoinder of causes of action. See PLEADING, 2.

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WITNESSES.

Examination: Leading questions. See MUNICIPAL CORPORATIONS, 26.

1. In the direct examination of a party or an interested witness, leading questions suggesting the answer favorable to him should never be allowed except under peculiar circumstances reasonably calling for such departure from the ordinary method. *Lyon v. Grand Rapids,* 609

Cross-examination. See CONTRACTS, 3. EVIDENCE, 1.

Privilege: Self-incrimination. See CORPORATIONS, 13.

Impeachment.

2. To permit an impeaching witness to be asked whether the witness sought to be impeached used certain particular language out of court, "or words of like meaning," was not error, on the ground that it made the witness the judge as to whether the words used were of "like meaning," since by cross-examination the opposing party might ascertain the precise words used. *Wysocki v. Wis. Lakes I. & C. Co.* 96

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